APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-71047
NLRB NO. 21-CA-29104

ORDER AND AMENDED OPINION

NATIONAL LABOR RELATIONS BOARD

Petitioner,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AMALGAMATED LOCAL UNION No. 509, AFL-CIO,

Petitioner-Intervenor,

v.

ADVANCED STRETCHFORMING INTERNATIONAL, INC.,

Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board

Argued and Submitted
April 13, 1999 – Pasadena, California

Filed April 4, 2000

Amended Opinion Filed November 22, 2000

Before: Robert Boochever, Diarmuid F. O'Scannlain and A. Wallace Tashima, Circuit Judges.

Opinion by Judge Boochever;
Dissent by Judge O'Scannlain

COUNSEL

Sharon I. Block, National Labor Relations Board, Washing, D.C., for the petitioner.

Henry M. Willis, Schwartz, Steinsapir, Dohrmann & Somers, Los Angeles, California, for the petitioner-intervenor.

Larry Walraven, O'Melveny & Myers, Newport Beach, California, for the respondent.

ORDER

Both Advanced Stretchforming International, Inc. ("ASI") and the National Labor Relations Board (the "Board") filed petitions for rehearing and rehearing *en banc*. The panel requested a response to these petitions and that response was filed and circulated to panel members and to all active judges. A judge of the court called for a vote on whether the case should be reheard en banc, but voting was suspended on the panel's indication that its opinion would be amended.

By unanimous vote, the panel hereby GRANTS ASI's petition for rehearing and GRANTS the Board's

petition for rehearing. Accordingly, the original opinions filed on April 4, 2000 as *NLRB v. Advanced Stretchforming Int'l, Inc.*, 208 F.3d 801 (9th Cir. 2000), are hereby AMENDED.

OPINION

BOOCHEVER, Circuit Judge:

We decide whether a successor employer forfeits its unilateral right to set initial terms of employment when it announces to the former employees of its unionized predecessor that there will be no union at the new company should they apply to work there.

I

Advanced Stretchforming International, Inc., ("ASI") manufactures structural body components used in the aerospace industry at a facility in Gardena, California. Prior to ASI's tenure, Aero Stretch, Inc. ("Aero") engaged in the same operations at the same site. Aero and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 509 ("UAW" or "Union") entered into a collective bargaining agreement ("CBA") for production and maintenance employees effective August 19, 1991 through August 19, 1994.

On June 11, 1992, Aero filed for bankruptcy under Chapter 11 of the Bankruptcy Act. Aero continued to operate, but gradually laid off employees. UAW representative Duane LaMothe contacted Aero's management over the ensuing months to check on Aero's bankruptcy status. At a November 19, 1992 hearing, the bankruptcy court converted Aero's bankruptcy to a Chapter 7 case and auctioned its assets.

Stephen Brown submitted the successful bid. As a condition of the sale, the bankruptcy judge ordered Aero to cease operations and to terminate all employees by November 30. On November 30, Brown called Aero's Manufacturing Director, Eric Cunningham, and told him to inform Aero employees that they could report to the plant the next day to interview for positions with ASI, which Brown incorporated on December 1. Cunningham called a meeting of Aero's employees and informed them that the plant had been purchased, and that all employees would be terminated at the end of the day, but that they should report to the plant the next day to interview for positions if they were interested in working for ASI. Two employees present at the meeting, and LaMothe, who was also present at the meeting, testified that Cunningham told the employees that there would be "no union, no seniority, no nothing" at ASI. Cunningham denied making such a statement, but testified that at some point he told the employees that ASI would not assume Aero's CBA.

On December 1, Brown interviewed and hired Cunningham as ASI's general manager. Brown and Cunningham then interviewed Aero's former employees who came to the plant that day. Brown required each applicant to sign the following statement:

> I UNDERSTAND THAT I WILL BE WORKING UNDER NEW TERMS AND CONDITIONS WHICH IS NOT A CONTRACT AND IS SUBJECT TO CHANGE.
>
> NEW COMPANY IS NOT ASSUMING COLLECTIVE BARGAINING AGREEMENT.
>
> YOU MAY BE EMPLOYED BY NEW COMPANY ON AN AT WILL BASIS.

DETAILED LIST OF TERMS AND CONDITIONS IS TO FOLLOW.

During the interviews, Brown informed each applicant that the new terms of employment would include different wages, no 401(k) plan, less vacation time, fewer holidays, no medical or dental benefits and at-will employment.

ASI hired eight of the seventeen former Aero production and maintenance employees. Four were hired at Aero's hourly rate; two received more and two received less.

UAW sent certified letters to ASI on December 3, 7, and 11, demanding that ASI recognize the Union as its employees' bargaining representative. UAW filed an unfair labor practice charge against ASI on December 11. On December 14, ASI conducted a poll of its employees regarding their desire for continued union representation. The employees voted against union representation. That same day, ASI's counsel wrote the union a letter advising that ASI did not recognize the UAW as the representative of its employees. On April 30, 1993, the National Labor Relations Board ("NLRB" or "Board") issued a complaint and notice of hearing against ASI.

After conducting a hearing, an Administrative Law Judge ("ALJ") found that ASI had violated sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1), (5), by (1) making the "no union" statement at the November 30 meeting, (2) improperly polling its employees regarding union representation on December 14, and (3) refusing to recognize and to bargain with UAW, as ASI was required to do as an alleged "successor" employer to Aero. The ALJ, however, rejected the General Counsel's claim that ASI had further violated the NLRA by setting the initial terms of employment on December 1. The ALJ reasoned that under *NLRB v. Burns*

Int'l Sec. Serv., Inc., 406 U.S. 272 (1972), ASI had the right to establish initial employment terms when it hired Aero's former employees.

The NLRB's General Counsel appealed the ALJ's decision that ASI did not violate the NLRA by setting the initial hiring terms, and the Board reversed. The Board reasoned that ASI had forfeited its right to set the initial terms of employment because it unlawfully "block[ed] the process by which the obligations and rights" of a successor are incurred when it made the "no union" statement. *Advanced Stretchforming Int'l, Inc.*, 323 N.L.R.B. 529, 530-31 (1997). Thus, the Board held that ASI unlawfully and unilaterally changed the employment terms without first bargaining with the union. *Id.* at 531.

Based on its conclusions, the Board adopted the ALJ's recommended order, but added to it, directing ASI, "in order to remedy [the] unlawful unilateral changes," to rescind any changes in employees' terms and conditions of employment unilaterally effectuated and to make the employees whole by remitting all wages and benefits that would have been paid absent [ASI's] unlawful conduct, until [ASI] negotiates in good faith with the Union to agreement or to impasse. *Id.*

The Board timely applied to this court for enforcement of its order. ASI does not challenge the Board's ruling on the "no union" statement, the union representation poll and the refusal to bargain with UAW. Accordingly, the Board's "finding of those unfair labor practices violations must be taken as established." *Idaho Falls Consol. Hosp., Inc. v. NLRB*, 731 F.2d 1384, 1386 (9th Cir. 1984). We grant summary enforcement of the Board's order with respect to those findings. *See Gardner Mech. Serv., Inc. v.*

NLRB, 115 F.3d 636, 643 n.2 (9th Cir. 1997).[1] ASI does not dispute the Board's determination that it committed separate violations of NLRA sections 8(a)(1) and (5) by unilaterally changing the terms of its carryover workforce's employment.

II

When ASI employed a majority of its workforce from Aero's former employees and carried on Aero's business essentially unchanged, ASI became a "successor" employer to Aero. *See Kallman v. NLRB*, 640 F.2d 1094, 1100 (9th Cir. 1981). A successor is obligated to recognize and bargain with the representative of its predecessor's former employees. *See NLRB v. Burns Int'l Sec. Serv., Inc.*, 406 U.S. 272, 280-81 (1972). Ordinarily, however, a successor is not bound by its predecessor's collective bargaining agreement, and is free to set the initial terms of employment for its workers without first consulting with their union. *See Burns*, 406 U.S. at 294-95. Nevertheless, the Board found that ASI "forfeited" its right to set initial terms without first bargaining when it made the statement that there would be "no union" at the new company.[2]

The forfeiture doctrine deprives a successor of its rights under *Burns* when the successor has failed to fulfill its corresponding *Burns* obligations. The Board has explained:

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[1] To remedy these violations, the Board's order requires that ASI (1) cease and desist these unfair labor practices; (2) recognize and bargain with UAW; (3) make various company records available for Board inspection; (4) post notices at its facilities informing its employees that it will no longer engage in any unfair labor practices; and (5) file a sworn certification with the NLRB's Regional Director that it has taken steps to comply with the order. ASI does not challenge these remedies.

[2] The dissent engages in a semantical attempt to equate the "forfeiture" of the right to set initial employment terms with a "penalty." The "forfeiture" in this case, however, merely places the parties in the position where they would have been had ASI refrained from engaging in improper conduct. Thus, the "forfeiture" qualifies as a permissible remedy.

> The fundamental premise for the forfeiture doctrine is that it would be contrary to statutory policy to confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred .... In other words, the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees' collective-bargaining representative and enter into good faith negotiations with that union about those terms and conditions.

Advanced Stretchforming Int'l, Inc., 323 N.L.R.B. 529, 530 (quotation marks, citation omitted).

Courts have approved the Board's application of the forfeiture doctrine in instances where an employer seeks to avoid obligations of successorship by strategically refusing to hire its predecessor's employees based on their union membership. *See, e.g., Kallman*, 640 F.2d at 1102-03; *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1008 (D.C. Cir. 1998); *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1320 (7th Cir. 1991). In *Kallman*, for example, we enforced the Board's finding that a successor forfeited its right to set initial terms of employment when it refused to hire a certain number of its predecessor's union employees in order to avoid application of a rule that would have required it to bargain before setting terms.

The rule whose application the successor sought to avoid in *Kallman* was the so-called "perfectly-clear" exception to the ordinary rule of *Burns*. Under this

exception, a successor must bargain before setting terms when it hires all or substantially all of its initial workforce from the ranks of a represented bargaining unit of its predecessor, it being then "perfectly clear" that a carryover majority desires representation. *See Kallman*, 640 F.2d at 1102-03; *Bellingham Frozen Food, Inc. v. NLRB*, 626 F.2d 674, 678-79 (9th Cir. 1980) ("When it is 'perfectly clear' that the employer intends to hire a majority of his workforce in a unit represented by a union from the ranks of his predecessor, his duty to bargain with the union commences immediately."). Had the successor in *Kallman* not discriminated against its predecessor's unionized employees, the "perfectly clear" exception would have required it to bargain before setting initial terms. We therefore found it appropriate to treat the successor as if the "perfectly clear" exception had applied, as it would have but for the successor's anti-union conduct. *Kallman*, 640 F.2d at 1102-03.

The question before us is whether ASI's "no union" statement "blocked the process by which the obligations of a successor are incurred" in a manner similar to the discriminatory hiring practices to which the forfeiture doctrine previously has been applied. We believe that it did. In *Kallman*, the successor employer's discriminatory hiring practices prevented the initial workforce from being constituted from the ranks of the predecessor, preempting the employees' right to bargain through their union prior to imposition of initial terms. Here, no discriminatory hiring practices prevented ASI's "perfectly clear" obligation from arising.[3] Instead, the "no union" statement chilled the invocation of that obligation once it had arisen. Having been

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[3] To the contrary, ASI hired its entire initial complement of workers from the ranks of a represented unit of its predecessor. The Board's order, however, was not based on the "perfectly clear" exception to Burns. We therefore do not address the applicability of that exception.

informed when invited to apply for work with ASI that there would be no union at the new company, Aero's workers may well have believed that employment with ASI was contingent on abstaining from union representation, including insistence on the right to bargain before ASI imposed initial terms. It was not unreasonable for the Board to conclude, as a practical matter, that the "no union" statement blocked the process by which ASI's obligations as a successor were incurred.

III

To remedy ASI's failure to consult with the Union before imposing terms, the Board ordered ASI to recognize the Union, and to pay back wages and benefits under the CBA from the time of the violation until ASI negotiated in good faith to a bargain or impasse. Though a successor may forfeit its right to set initial terms unilaterally when it engages in improper activities to evade the obligations of successorship, the successor has "no obligation to accept his predecessor's labor agreement." *Kallman*, 640 F.2d at 1103. Consequently, when employees are awarded back pay running from the time the successor acquires the business until it finally bargains to an agreement or an impasse pursuant to a duty to bargain imposed after lengthy proceedings, employees may receive far more than they would have if the violation had never occurred. Thus we have held that "to the extent that a back pay order requires payment at the higher rate for the entire period of ownership, it acts as a penalty." *Id.* Rather, "an appropriate back pay remedy cannot require [the successor] to pay the higher rate beyond a period allowing for a reasonable time of bargaining." *Id.*

This limitation on the period for which back pay may be awarded applies, however, only when it is clear that the

successor "lawfully would not have agreed to the wage scale provided by the predecessor's labor agreement, and the resulting impasse would have resulted in reduced wages." *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1467 (9th Cir. 1997). Whether bargaining would have resulted in impasse had the violation not occurred will often be a matter of some uncertainty. In *New Breed* we held that any such uncertainty "should be resolved against the employer who discriminates," and we therefore placed the burden of persuasion on the successor to show that it would not have agreed to the higher wages. *Id.* at 1468.

In reaching this conclusion, we were persuaded by the Seventh Circuit's reasoning in *U.S. Marine*, 944 F.2d at 1321, that a successor should not benefit from an ambiguity that results from its own wrongdoing. Thus in *New Breed*, where the successor "failed to shoulder its evidentiary burden," we found that "the Board's grant of back pay based on the predecessor Union's pay scale restores as nearly as possible the employment situation that would have occurred absent" the unfair labor practice. *New Breed*, 111 F.3d at 1468-69. But where, as in *Kallman*, "[t]he facts demonstrate that [the successor] would not have agreed to union demands to pay the higher rate," the successor may not be required "to pay the higher rate beyond a period allowing for a reasonable time of bargaining." *Kallman*, 640, F.2d at 1103.

In fashioning its remedy in this case, the Board attempted to put the parties in the place they would have been had ASI not made the "no union" statement. This may literally be impossible as "The Moving Finger writes; and, having writ, Moves on: nor all your Piety nor Wit Shall lure it back to cancel half a Line, Nor all you Tears wash out a Word of it." Edward Fitzgerald, the Rubaiyat of Omar Khayyam, st. 71 (4th ed. 1879). One reasonable hypothesis is that, had ASI not made the "no union" statement, the

union and ASI would have bargained to impasse before ASI set the new employment terms. We must give deference to the remedy fashioned by the Board. *See New Breed*, 111 F.3d at 1464-65. Here, the forfeiture of the right to set the new terms before bargaining to impasse was a permissible method of placing the parties where they would have been had ASI not made the "no union" statement.

The Board applied the presumption that an award of back pay and benefits under the repudiated bargaining agreement restores the status quo ante, but did not consider whether ASI had rebutted the presumption with evidence that it would have bargained to an impasse and imposed less favorable terms. *See New Breed*, 111 F.3d at 1468; *see also U.S. Marine*, 944 F.2d at 1323 ("[I]t is for the employer to demonstrate that it is not appropriate [to award back pay]. U.S. Marine has failed to do so.") (quotation marks, citation, and original alterations omitted). Nor did the LJ make any findings in this regard, as the ALJ did not award back pay and benefits under any exception to the *Burns* rule.

Those facts that are in the record and bear on this question are equivocal. The ALJ found that of the eight Aero unit employees originally hired on December 1, 1992, four received the same hourly wage they had previously been paid by Aero, two received significantly more, and two received significantly less. ASI provided less vacation time and paid holidays, however, and no medical or dental benefits. Nevertheless, the ALJ found little to indicate that ASI could have found a qualified workforce outside of Aero's ranks had ASI not been able to come to terms with the incumbent union. The ALJ noted that ASI had rejected transferring employees from a machine shop that Brown owned in Gardena due to the unacceptable commute, and found that, to continue Aero's business, ASI needed a

workforce with specialized skills that were not readily available in the marketplace.

The mere fact that ASI provided fewer benefits under the terms that it imposed provides little indication of what ASI might have agreed to had it fulfilled its obligation to bargain with the Union. The apparent unavailability of qualified workers outside of the Aero unit and the need to complete Aero's work in progress indicate that the Union might have brought significant negotiating power to the table. On the other hand, the fact that Aero's bankruptcy indicates that ASI might have been unwilling or even unable to continue to operate the business without significant labor concessions, and might have chosen to liquidate the company's assets rather than continue operating under the terms of the previous CBA.

Were the question regarding what would have happened had ASI recognized and bargained with the Union presented to us on a record that was ambiguous despite having been fully developed under the correct legal standard, we would resolve any uncertainty by affirming the Board's award under *New Breed*. *See New Breed*, 111 F.3d at 1468. Because the record was not fully developed on this point, however, we remand to permit ASI and the UAW to present evidence on whether ASI would have bargained to impasse and imposed terms, even had ASI honored its obligation to bargain with the Union.

IV

The Petition for Enforcement is GRANTED IN PART and REMANDED IN PART. Each party shall bear its own costs.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I concur in Part I of the court's opinion, granting summary enforcement to the National Labor Relations Board's ("Board") order of prospective relief to redress Advanced Stretchforming International, Inc.'s ("ASI") violations of the National Labor Relations Act ("NLRA").

I must respectfully dissent, however, from Parts II and III. In my view, the Board's award of back pay under the terms of the collective bargaining agreement of ASI's predecessor violates the holding of *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). This award does nothing to redress ASI's actual violations and does not restore the *status quo ante*. It constitutes a penalty well in excess of the Board's legal authority. In holding that this award is presumptively appropriate, the majority opinion misconstrues and misapplies the so-called "forfeiture doctrine," transforming it into a broad new exception capable of swallowing the rule set forth in *Burns* that a successor employer is not bound by its predecessor's collective bargaining agreement and is ordinarily free to set the initial terms of employment unilaterally. By arming the Board with an unauthorized power to punish, the majority has impermissibly upset the balance of power between management and labor that Congress established in the Act. I respectfully dissent.

I

The majority's analysis begins innocently enough by restating the general rule from *Burns* that a successor employer is not bound by its predecessor's collective bargaining agreement ("CBA") and is free to set the initial terms of employment for its workers without first consulting with their union. *See Burns*, 406 U.S. at 287-88. According to the majority, however, an employer's "rights under *Burns*" to take such unilateral action can be forfeited if the

successor "has failed to fulfill its corresponding *Burns* obligations." *Supra* at 15101. The majority reasons that, in the present case, ASI " 'blocked the process by which the obligations of a successor are incurred' " by telling prospective workers that there would be "no union" at ASI and thus it forfeited its "*Burns* rights." *Supra* at 15103 (quoting the Board's decision, *Advanced Stretchforming, Int'l*, 323 N.L.R.B. 529, 531 (1997)).

Somewhat surprisingly, the majority does not bother to tell us what exactly ASI's "*Burns* obligations" were and why its failure to fulfill such obligations might possibly be remedied by the forfeiture of ASI's "*Burns* rights" ordered by the NLRB – namely, an award of back pay under the terms of its predecessor's CBA. In fact, the reason for the majority's evasion is clear enough; the forfeiture doctrine is simply inapplicable here. The forfeiture doctrine is premised on the theory that an employer should forfeit its right to set the initial terms of employment only where it evades an actual legal obligation to consult with a union *before* imposing initial terms. In contrast, ASI was under *no* such obligation to consult with the UAW prior to imposing its initial terms of employment. In the majority's hands, the forfeiture doctrine becomes a punishment rather than a remedy.

A

In *Burns*, the Supreme Court addressed the obligations under the NLRA of successor employers such as ASI. The Court held that when a new employer acquires a business, it is free, generally, to set the initial terms and conditions of employment, and is not bound by its predecessor's CBA. *See id.* at 281-82, 287-88, 294-95. The successor employer is, however, obligated to bargain with the union after setting initial terms. *See id.* at 281.

There are three established exceptions to the *Burns* rule. A successor employer's right to set initial terms is limited if (1) the successor employer is the "alter ego" of the predecessor, *see Sheet Metal Workers Int'l Assoc. v. Arizona Mechanical & Stainless, Inc.*, 863 F.2d 647, 651 (9th Cir. 1988); (2) the successor employer assumes or adopts the obligations of the predecessor's CBA, *see id.*; or (3) if "it is *perfectly clear* that the new employer plans to retain all of the employees in the [bargaining] unit," *Burns*, 406 U.S. at 294-95 (emphasis added).

The third exception to the *Burns* rule, the "perfectly clear" exception, requires a successor to consult with an incumbent union *before* altering the predecessor's terms and conditions of employment when it is "perfectly clear that the new employer plans to retain all of the employees in the [bargaining] unit." *Burns*, 406 U.S. at 294-95. The Court established this exception in *Burns*, stating:

> Although a successor employer is ordinarily free to set the initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially *consult* with the employees' bargaining representative *before* he fixes terms.

Id. (emphasis added). An employer subject to this exception is not bound by its predecessor's CBA, nor is it required to agree to the terms the union proposes. *See Burns*, 406 U.S. at 282. Rather, the successor employer must simply "consult" with the union before setting the initial terms and conditions of employment. *See id.* at 295; *Kallmann v. NLRB*, 640 F.2d 1094, 1102 (9th Cir. 1981).

The majority has sensibly abandoned its previous attempt to justify the Board's award under the *Burns* perfectly clear exception.[4] This is prudent, given that the ALJ correctly concluded that the exception is simply not implicated on these facts and the Board itself specifically disavowed any reliance on it, stating that the exception "was not determinative of the legality of [ASI's] conduct." *Advanced Stretchforming*, 323 NLRB at 529. Unfortunately, the *Burns* perfectly clear exception remains lurking in the background. The Board's award can only be justified if ASI breached a duty to negotiate with the UAW *prior* to setting the initial terms of employment. Despite its new reliance on the forfeiture doctrine without reference to the perfectly clear exception, the majority (to borrow from its quotation of the Rubaiyat of Omar Khayyam) has failed to cancel half a Line" or "wash out a Word" of its previous ill-starred attempt to apply the *Burns* perfectly clear exception to this case.

In actuality, given that the perfectly clear exception does *not* apply here, ASI's only obligation under *Burns* was to negotiate with the UAW *after* it had unilaterally set initial terms of employment. It is not contested that ASI breached this obligation. Nevertheless, as the majority concedes, the Board's award of back pay was premised on the notion that "ASI unlawfully and *unilaterally* changed the employment terms without *first* bargaining with the union." *See supra* at 15099 (citing *Advanced Stretchforming Int'l*, 323 N.L.R.B. 529, 531 (1997)) (emphasis added). Because ASI was punished for violating an obligation it did not, in fact, have, the Board's award of back pay should be rejected.

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[4] The majority affirmed the Board's award on the basis of the perfectly clear exception in a now-withdrawn opinion. *See NLRB v. Advanced Stretchforming Int'l, Inc.*, 208 F.3d 801 (9th Cir. 2000).

B

In its attempt to justify the Board's award, the majority invokes the so-called "forfeiture doctrine," which courts have properly characterized as "corollary" to the perfectly clear exception. *See Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999 (D.C. Cir. 1998).

The majority views the doctrine differently. Quoting the Board, the majority describes the forfeiture doctrine as follows:

> The fundamental premise for the forfeiture doctrine is that it would be contrary to statutory policy to "confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has *unlawfully blocked the process by which the obligations and rights of such a successor are incurred.*" ... In other words, the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees' collective-bargaining representative and enter into good-faith negotiations with that union about those terms and conditions.

See supra at 15101 (quoting *Advanced Stretchforming*, 323 NLRB 529, 530) (emphasis added). Thus, in the Board's view, a view which the court today adopts, another exception to the *Burns* rule exist when a new employer attempts to avoid becoming a successor employer or fails to fulfill its duty to recognize and to bargain with the incumbent union. Apparently, only a successor who complies with *all* of its obligations under the NLRA can set the initial terms of employment; any unfair labor practice that "block[s] the process by which the obligations and rights of [ ] a successor are incurred," *id.*, causes the employer to forfeit its rights.

Hence, the majority opinion concludes that ASI's "no union" statement caused ASI to forfeit its right to set initial terms without first bargaining with UAW. The majority has it wrong.

As the majority implicitly acknowledges, *see supra* at 15102, courts have previously applied the forfeiture doctrine only in cases in which a successor employer discriminatorily refused to hire its predecessor's employees because of their union membership. See *Kallmann*, 640 F.2d at 1102-03; *U.S. Marine Corp.*, 293 NLRB 669 (1989), *enforced*, 944 F.2d 1305 (7th Cir. 1991). Indeed, courts have held that a successor employer who discriminatorily refuses to hire its predecessor's employees based on their union membership forfeits its right to set the initial terms of employment. *See e.g., Kallmann*, 640 F.2d at 1102-03; *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305,1320 (7th Cir. 1991); *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st. Cir. 1995); *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1008 (D.C. Cir. 1998). The majority now seeks to expand, for the first time, the scope of the forfeiture doctrine outside the discriminatory hiring context.

The majority justifies its application of the forfeiture doctrine here because ASI's violation of the NLRA by making "no union" statements is "similar" to the discriminatory hiring practices of employers such as Kallmann. This is simply not the case. The discriminatory hiring cases are distinguishable because the "fundamental premise" behind the forfeiture doctrine in the discriminatory hiring case is that *but for* the successor employer's discriminatory refusal to hire its predecessor's employees, the employer would have come within the perfectly clear exception to the *Burns* rule, and thus would have been obligated to consult the union before setting the initial terms of employment. See *U.S. Marine*, 944 F.2d at 1320 ("Where

all or substantially all of the predecessor's employees would have been retained but for the successor's unlawful discrimination, the successor loses the right to set initial terms and conditions of employment and violates the [NLRA] if it unilaterally alters the predecessor's terms without first consulting with the union .... But for its unlawful conduct, U.S. Marine would have hired substantially all of [its predecessor's] employees and therefore would have been obligated to consult with the Union before setting the terms and conditions of employment."); *Capital Cleaning*, 147 F.3d at 1008 ("[B]ecause Capital refused to hire the Ogden employees based upon their union membership, the Board properly presumed that but for such discrimination Capital would have hired a majority of the Ogden employees from the outset. Accordingly, Capital had a duty to bargain with Local 32 and therefore did not have the right unilaterally to set the terms and conditions upon which it offered employment.").

Applying the forfeiture doctrine in these types of cases prevents the successor employer from avoiding the perfectly clear exception through his "unlawful conduct." *See Kallmann*, 640 F.2d at 1102-03 (holding that the Board correctly found that the perfectly clear exception applied because "any uncertainty regarding whether substantially all the former employees would have been retained had to be resolved against [the successor employer] because he could not benefit from his ... [discriminatory] conduct" (footnote omitted)). More precisely, because the employers in such cases never would have had the right unilaterally to set the initial employment terms absent their discriminatory hiring, holding that they forfeit their right to set the initial terms of employment simply restores the *status quo ante*. *Cf. Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (noting that the Board's remedial authority includes the ability "to restore the

situation 'as nearly as possible, to that which would have obtained' but for" any unfair labor practice (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941))).

Such rationale, however, does not justify holding that ASI forfeited its right to set initial terms. The majority falls far short in explaining how the application of the forfeiture doctrine here restores the situation to the *status quo ante*. *But for* ASI's unlawful conduct, i.e., its "no union" statement, it *still* would not have been subject to the "perfectly clear" exception and hence did not have any duty to consult with UAW before setting the initial terms of employment. Thus, the majority's "hypothesis," *see supra* at 15105, that ASI might have bargained to impasse *before* setting initial terms had it not made the "no union" statement is patently unreasonable.

Clearly, then, because the rationale underlying the forfeiture doctrine is inapplicable to this case, the discriminatory hiring cases provide absolutely no authority for the court's argument that ASI should be held to have forfeited its right to set initial hiring terms. The remedy that the Board misapplied in this case is one specifically designed to redress an employer's violation of the obligation created by the "perfectly clear" exception, nothing more. The majority utterly fails to justify extending its application here.

C

Given this close link between the forfeiture doctrine and the perfectly clear exception of *Burns*, could it be that, despite its disclaimer in footnote 3, the majority has persisted in its attempt to apply the perfectly clear exception to the instant case, this time *sub silentio*? The majority justifies its application of the forfeiture doctrine thus:

> Here, no discriminatory hiring practices prevented ASI's "perfectly clear" obligation from arising. Instead, the "no union" statement chilled the invocation of *that obligation* once it had arisen. Having been informed when it invited to apply for work with ASI that there would be no union at the new company, Aero's workers may well have believed that employment with ASI was contingent on abstaining from union representation, *including insistence on the right to bargain before ASI imposed initial terms*.

Supra at 15103 (emphasis added). The majority misses the point. Because none of the exceptions to the *Burns* rule applies here, Aero's workers had, in fact, *no* right to union bargaining before ASI imposed initial terms. While the majority now explicitly disclaims any reliance on the *Burns* "perfectly clear" exception, it nonetheless denies that ASI had the right unilaterally to set its initial terms of employment. The latter simply cannot be true.

II

The majority's application of the forfeiture doctrine is not only fundamentally inconsistent with the doctrine's underlying rationale, it is irreconcilable with *Burns* itself. In that case, Burns, as a successor employer, had violated the NLRA by unlawfully assisting a union which was a rival of its predecessor's employees' union and failing to recognize and to bargain with the incumbent union. *See* 406 U.S. at 276. However, the Court rejected the Board's finding that Burns was bound by its predecessor's CBA or that it had violated the NLRA by setting initial employment terms. *See id.*

The Court viewed a successor's duty to bargain and the right to set initial terms as separate issues:

> Although Burns had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so, ... *[i]t is difficult to understand how Burns could be said to have changed* unilaterally any pre-existing terms or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to [the date Burns began operations], no outstanding terms and conditions of employment from which a change could be inferred.

Id. at 294 (italics in original) (emphasis added). Thus, the Court rejected the Board's position that Burns violated the NLRA by setting the initial terms of employment, even though Burns can be said to have attempted to "block[ ] the process by which the obligations and rights of [ ] a successor are incurred," *see supra* at 15101, by refusing to bargain with the incumbent union and by unlawfully assisting a rival union. *See Burns*, 406 U.S. at 295-96.

Burns directly controls this case. In *Burns*, the employer violated the NLRA by failing to bargain with the incumbent union and interfering with its employees' organizational rights by assisting a rival union, and yet the Court held that Burns *retained* the right to set initial hiring terms. *See* 406 U.S. at 294. Here, ASI similarly violated the NLRA by failing to bargain with the incumbent union and by interfering with its employees' organizational rights through its "no union" statement. Yet, *contrary to Burns*, the court today holds that ASI forfeited the right to set initial hiring terms. The court appears to confuse a successor employer's obligations under the NLRA, and its right to set the initial terms of employment. *Burns* made clear that these issues are not inter-linked.

III

The Board has only remedial power and does not have the power to impose punishment for violations of the NLRA. *See Phelps Dodge*, 313 U.S. at 194. This limitation on the Board's authority "at a minimum ... encompasses the requirement that a proposed remedy be tailored to the unfair labor practice it is intended to redress." *Sure-Tan, Inc.* 467 U.S. at 900. the majority has not even come close to explaining how forfeiture of ASI's right unilaterally to establish employment terms redresses ASI's unlawful "no union" statements. ASI never had, and never would have had, an obligation to consult with the UAW prior to imposing initial terms. The appropriate remedy for ASI's "no union" statement is an order directing ASI to cease and desist telling potential applicants that ASI intends to operate with no union. The Board's order does so in this case. To add that ASI *forfeited* its right to set the initial terms of employment because of this unfair labor practice is "a penalty by another name – and not a much different name at that." *U.S. Marine*, 944 F.2d at 1328 (Easterbrook, J., dissenting). Indeed, a synonym of forfeit is "penalty." *See* Webster's Ninth New Collegiate Dictionary 484 (1987) (defining forfeit as "something forfeited or subject to being forfeited ... PENALTY").

This court cannot authorize the Board to impose penalties. I respectfully dissent.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-71047
NLRB NO. 21-CA-29104

OPINION

NATIONAL LABOR RELATIONS BOARD

Petitioner,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AMALGAMATED LOCAL UNION No. 509, AFL-CIO,

Petitioner-Intervenor,

v.

ADVANCED STRETCHFORMING INTERNATIONAL, INC.,

Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board

Argued and Submitted
April 13, 1999 – Pasadena, California

Filed April 4, 2000

Before: Robert Boochever, Diarmuid F. O'Scannlain and A. Wallace Tashima, Circuit Judges.

Opinion by Judge Boochever;
Dissent by Judge O'Scannlain

COUNSEL

Sharon I. Block, National Labor Relations Board, Washington, D.C., for the petitioner.

Henry M. Willis, Schwartz, Steinsapir, Dohrmann & Sommers, Los Angeles, California, for the petitioner-intervenor.

Larry Walraven, O'Melveny & Myers, Newport Beach, California, for the respondent.

OPINION

BOOCHEVER, Circuit Judge:

We decide whether a successor employer has a duty to bargain with an incumbent union before unilaterally imposing terms when the employer hires its initial workforce from the ranks of a represented bargaining unit of its predecessor.

I

Advanced Stretchforming International, Inc., ("ASI") manufactures structural body components used in the aerospace industry at a facility in Gardena, California. Prior to ASI's tenure, Aero Stretch, Inc. ("Aero") engaged in the same operations at the same site. Aero and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 509 ("UAW" or "Union") entered into a collective bargaining agreement ("CBA") for production and maintenance employees effective August 19, 1991 through August 19, 1994.

On June 11, 1992, Aero filed for bankruptcy under Chapter 11 of the Bankruptcy Act. Aero continued to operate, but gradually laid off employees. UAW representative Duane LaMothe contacted Aero's management over the ensuing months to check on Aero's bankruptcy status. At a November 19, 1992, hearing, the bankruptcy court converted Aero's bankruptcy to a Chapter 7 case and auctioned its assets.

Stephen Brown submitted the successful bid. As a condition of the sale, the bankruptcy judge ordered Aero to cease operations and to terminate all employees by November 30. On November 30, Brown called Aero's Manufacturing Director, Eric Cunningham, and told him to inform Aero employees that they could report to the plant the next day to interview for positions with ASI, which Brown incorporated on December 1. Cunningham called a meeting of Aero's employees and informed them that the plant had been purchased, and that all employees would be terminated at the end of the day, but that they should report to the plant the next day to interview for positions if they were interested in working for ASI. Two employees present at the meeting, and LaMothe, who was also present at the meeting, testified

that Cunningham told the employees that there would be "no union, no seniority, no nothing" at ASI. Cunningham denied making such a statement, but testified that at some point he told the employees that ASI would not assume Aero's CBA.

On December 1, Brown interviewed and hired Cunningham as ASI's general manager. Brown and Cunningham then interviewed Aero's former employees who came to the plant that day. Brown required each applicant to sign the following statement:

> I UNDERSTAND THAT I WILL BE WORKING UNDER NEW TERMS AND CONDITIONS WHICH IS NOT A CONTRACT AND IS SUBJECT TO CHANGE.
>
> NEW COMPANY IS NOT ASSUMING COLLECTIVE BARGAINING AGREEMENT.
>
> YOU MAY BE EMPLOYED BY NEW COMPANY ON AN AT WILL BASIS.
>
> DETAILED LIST OF TERMS AND CONDITIONS IS TO FOLLOW.

During the interviews, Brown informed each applicant that the new terms of employment would include different wages, no 401(k) plan, less vacation time, fewer holidays, no medical or dental benefits and at-will employment.

ASI hired eight of the seventeen former Aero production and maintenance employees. Four were hired at Aero's hourly rate; two received more and two received less.

UAW sent certified letters to ASI on December 3, 7, and 11, demanding that ASI recognize the Union as its employees' bargaining representative. UAW filed an unfair

labor practice charge against ASI on December 11. On December 14, ASI conducted a poll of its employees regarding their desire for continued union representation. The employees voted against union representation. That same day, ASI's counsel wrote the union a letter advising that ASI did not recognize the UAW as the representative of its employees. On April 30, 1993, the National Labor Relations Board ("NLRB" or "Board") issued a complaint and notice of hearing against ASI.

After conducting a hearing, an Administrative Law Judge ("ALJ") found that ASI had violated sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA") by (1) making the "no union" statement at the November 30 meeting, (2) improperly polling its employees regarding union representation on December 14, and (3) refusing to recognize and to bargain with UAW, as ASI was required to do as an alleged "successor" employer to Aero. The ALJ, however, rejected the General Counsel's claim that ASI had further violated the NLRA by setting the initial terms of employment on December 1. The ALJ reasoned that under *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972), ASI had the right to establish initial employment terms when it hired Aero's former employees.

The NLRB's General Counsel appealed the ALJ's decision that ASI did not violate the NLRA by setting the initial hiring terms, and the Board reversed. The Board reasoned that ASI had forfeited its right to set the initial terms of employment because "it unlawfully blocked the process by which the obligations and rights" of a successor are incurred when it made the "no union" statement. *Advanced Stretchforming Int'l*, 323 N.L.R.B. 529, 531 (1997). Thus, the Board held that ASI unlawfully and unilaterally changed the employment terms without first bargaining with the union. *Id.*

Based on its conclusions, the Board adopted the ALJ's recommended order, but added to it, directing ASI, "in order to remedy [the] unlawful unilateral changes," to

> rescind any changes in employees' terms and conditions of employment unilaterally effectuated and to make the employees whole by remitting all wages and benefits that would have been paid absent [ASI's] unlawful conduct, until [ASI] negotiates in good faith with the Union to agreement or impasse.

Id.

The Board timely applied to this court for enforcement of its order.

II

In the proceedings before the Board, ASI did not challenge the ALJ's findings that ASI violated sections 8(a)(1) and (5)[1] of the NLRA. Section 10(e) of the NLRA provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). "The failure [ ] of the employer to object to the ALJ's findings before the Board precludes the raising of those issues on appeal." *Idaho Falls Consol. Hosps., Inc. v. NLRB*, 731 F.2d 1384, 1386 (9th Cir. 1984).

Thus, ASI could not, and, indeed, does not, challenge the Board's rulings on the "no union" statement, the union representation poll and the refusal to bargain with UAW.

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[1] Section 8(a)(1) provides, in pertinent part, that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their collective bargaining rights. 29 U.S.C. § 158(a)(1).

Accordingly, the Board's "finding of those unfair labor practices violations must be taken as established," *id.*, and we grant summary enforcement of the Board's order with respect to those findings. See *Gardner Mechanical Servs., Inc. v. NLRB*, 115 F.3d 636, 643 n.2 (9th Cir. 1997).[2]

III

ASI does challenge, however, the Board's finding that ASI violated sections 8(a)(1) and (5) of the NLRA by unilaterally changing its employees' terms and conditions of employment when they were hired on December 1. ASI claims that it was privileged to set the initial terms upon which it would hire former Aero employees. The Board argues that ASI forfeited this right when it informed Aero's employees that it intended to operate without a unionized workforce. Resolution of this issue requires a review of what has come to be known as the "successorship doctrine" – a body of labor law which governs the rights and obligations of "successor" employers.

A

Central to this body of law is the "*Burns* rule," which provides that when a new employer acquires a business, it is free, generally, to set the initial terms and conditions of employment, and is not bound by its predecessor's CBA. *See Burns*, 406 U.S. at 281-82, 287-88, 294-95. Despite this freedom, however, the new employer must recognize and bargain with the union representing its predecessor's

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[2] To remedy these violations, the Board's order requires that ASI (1) cease and desist these unfair labor practices; (2) recognize and bargain with UAW; (3) make various company records available for Board inspection; (4) post notices at its facilities informing its employees that it will no longer engage in any unfair labor practices; and (5) file a sworn certification with the NLRB's Regional Director that it has taken steps to comply with the order. ASI does not challenge these remedies.

employees if the new employer is a "successor" employer. *See id.* at 281; *Kallmann v. NLRB*, 640 F.2d 1094, 1100 (9th Cir. 1981). A new employer is a successor if "the [new] employer conducts essentially the same business as the former employer, and . . . a majority of the new employer's work force are former employees or would have been former employees absent a refusal to hire because of anti-union animus." *Id.*[3]

ASI concedes that it must be treated as a successor employer. Thus, as the ALJ found, and the Board affirmed, ASI had a duty to recognize and to bargain with UAW, Aero's employees' representative. ASI failed to fulfill this duty and, thus, the Board found that it violated the NLRA.

ASI disputes, however, the Board's separate determination that it violated sections 8(a)(1) and (5) by "unilaterally changing its employees' wages and other terms and conditions of employment at the time of their hire." *Advanced Stretchforming*, 323 NLRB at 529. The Board identified the "only issue" in this case as "whether [ASI], as a successor employer obligated to recognize the Union's continuing status as a collective-bargaining representative, had the legal right to establish unilaterally its initial terms and conditions of employment for bargaining unit employees." *Id.* Because the Supreme Court held in *Burns* that "a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor," despite its duty to bargain with its predecessor's employees' union,[4] 406 U.S. at 294, ASI would indeed have been free to

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[3] Although a new employer is not required to hire its predecessor's employees, *see Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 261-62 (1974), the new employer may not lawfully refuse to hire them because of their union affiliation, *see Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987).

[4] Thus, a new employer may begin operations pursuant to terms that it has set and operations may proceed under those terms while the new employer is

set initial hiring terms when it began operations on December 1, unless an exception to this general rule applied.

B

One qualification to the rule in *Burns* is the "perfectly clear" exception. The duty to bargain with an incumbent union arises when it becomes evident that the union represents a majority of the employees hired by the new employer. *See id.* at 281 ("[W]here the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent [the Board may] order[ ] the employer to bargain with the incumbent union."). In some cases, such as Burns itself, the duty to bargain is not evident until the employer has hired its full initial complement of employees, "since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit . . . ." *Id.* at 295. In such cases, it is not an unfair labor practice unilaterally to impose initial terms of employment, because at that point, the duty to bargain has not yet arisen. See *id.* But in other cases, it will be "perfectly clear that the new employer plans to retain all of the employees in the unit," and thus apparent from the outset that the incumbent union represents a majority of the employees. *Id.* at 294-95. In these cases, "it will be appropriate to have [the employer] initially consult with the employees' bargaining representative before he fixes terms." *Id.* at 295.

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fulfilling its duty to bargain with the union until agreement or impasse. *See Kallman*, 640 F.2d at 1102 (stating that *Burns* held that "a successor employer is ordinarily free to set initial hiring terms without preliminary bargaining with the incumbent union"). If the employer fulfills its duty to bargain in good faith with the union, and the employer and the union are unable to agree on the terms of employment, the employer may continue to operate under the terms it initially set. *See Burns*, 406 U.S. at 295.

The duty to bargain before imposing terms is based on the fact that a majority of the successor employer's initial workforce have chosen to be represented by an incumbent union. Therefore, the example given in *Burns* itself, where the successor hires all of the predecessor's employees (and presumably few others), is not exhaustive of the perfectly clear exception. The *Burns* perfectly clear exception to the right of the employer to set the initial terms of employment applies whenever it is apparent that the incumbent union continues to represent a majority of the initial workforce. Thus we have held that "[i]f a majority of the employees in the unit after the purchase were in the unit before the purchase, there is a duty to bargain, it being assumed that the holdover majority continues to desire representation by the [u]nion." *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 678 (9th Cir. 1980). "When it is 'perfectly clear' that the employer intends to hire a majority of his workforce in a unit represented by a union from the ranks of his predecessor, his duty to bargain with the [u]nion commences immediately." *Id.* at 678-79.

The circumstances surrounding the takeover in this case strongly indicate ASI's intent to hire its initial workforce from the ranks of its predecessor. At a meeting the day before the takeover, Cunningham told Aero's employees to report to the plant at the regular time the next day if they wished to apply for employment with ASI. Two witnesses testified, and the ALJ concluded, that Cunningham stated that ASI intended to hire some Aero workers immediately, and others as work became available. ASI then hired all eight of its initial unit employees from Aero's ranks. There is no evidence that ASI interviewed any non-Aero employees. After their interviews, the unit employees continued work that had been in progress at Aero and commenced similar work for ASI.

ASI's hiring activities after the takeover are also substantially identical to those that we considered indicative of an intent to hire the predecessor's employees in *Bellingham*. In *Bellingham*, the successor hired all of its initial workforce from its predecessor, and then continued to hire its predecessor's former employees for many months as work and vacancies permitted. *Id.* at 679. Here, after hiring its initial workforce exclusively from Aero's ranks, ASI continued to hire former Aero unit employees to expand its workforce as business permitted. ASI did not hire its first non-Aero employee until several months after the takeover, and three of the four non-Aero employees in the unit when the ALJ hearing commenced in September 1993 were not hired until ASI had already hired fifteen of the seventeen former Aero unit employees. At no time did former Aero employees cease to constitute an overwhelming majority of the unit under ASI.

Under such circumstances, it is perfectly clear that ASI intended from the outset to constitute the majority of its workforce from the ranks of its predecessor, and its duty to bargain therefore commenced immediately. Consequently, it was an unfair labor practice for ASI to impose terms without first consulting with the union.

IV

The Board did not address the application of the perfectly clear exception to the circumstances of this case, but instead found that ASI had forfeited its right to impose initial terms under *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305 (7th Cir. 1991), by declaring that there would be no union, and by conducting an improper poll. Because we find that the perfectly clear exception to the *Burns* rule applies in this case, we need not take up the Board's application of the forfeiture doctrine to affirm its finding that ASI's unilateral

imposition of terms violated Sections 8(a)(5) and (1) of the NLRA.

The dissent contends that in so doing, we "ignore[ ] basic tenets of administrative law," because we must uphold the Board's order under the forfeiture doctrine, or not at all. Slip op. at 3834. The general rule is of course well established that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). But the rule is not so broad as the dissent would suggest. "The rule is to the effect that a reviewing court, *in dealing with a determination or judgment which an administrative agency alone is authorized to make*, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.* (*Chenery II*), 332 U.S. 194, 196 (1947) (emphasis added); *see also Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir.), *cert. denied*, 119 S. Ct. 371 (1998) ("[*Chenery*] does not prohibit a reviewing court from affirming an agency decision on a ground different from the one used by the agency if the new ground is not one that calls for a determination or judgment which an administrative agency alone is authorized to make." (quotations omitted)).

"[T]he court is not so bound when, as here, the issue in dispute is the interpretation of a federal statute." *Railway Labor Executives' Ass'n v. Interstate Commerce Comm'n*, 784 F.2d 959, 969 (9th Cir. 1986). Directly on point is *North Carolina Commission of Indian Affairs v. United States Department of Labor*, 725 F.2d 238, 240 (4th Cir. 1984), on which we relied in *Railway Labor Executives*. In *North Carolina Commission*, the administrative judge found that the Comprehensive Employment and Training Act of 1973, 29 U.S.C. § 801, implicitly authorized the Department

of Labor to obtain repayment from states of improperly paid funds. The court of appeals affirmed, but on the ground that the right to repayment was express in the statute under the rationale of *Bell v. New Jersey and Pennsylvania*, 461 U.S. 773 (1983). *See North Carolina Comm'n*, 725 F.2d at 240-41.

Here, the issue is whether Sections 8(a)(5) and (1) of the National Labor Relations Act require a successor employer to bargain collectively before imposing terms when it hires its initial complement of workers entirely from the ranks of a represented unit. This is an issue of statutory interpretation, *see Burns*, 406 U.S. at 277-81, and one that we decided conclusively in *Bellingham*, 626 F.2d at 678-79. The Board's forfeiture rationale, adopted from the Seventh Circuit's decision in *U.S. Marine*, is simply an alternative gloss on the same statutory provisions, but one that has not been likewise conclusively established in this circuit. We do not transgress *Chenery* by enforcing the Board's order under a better established interpretation of the same statutory provisions on which the Board relied in reaching its result.

Moreover, we are not required to remand when it is certain that the agency would reach the same result under the correct rule. See *Vista Hill Found., Inc. v. Heckler*, 767 F.2d 556, 566 n.9 (9th Cir. 1985). "*Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). As a litigant, the Board has pressed the perfectly clear rationale at every stage in these lengthy proceedings. The factual predicate for the application of the perfectly clear doctrine has been exhaustively developed in the record below. Were we to decline to adopt the Board's forfeiture rationale, and remand instead of deciding the question of ASI's liability, *Bellingham* would still dictate the ultimate result. "A remand is not required when it would be an idle

and useless formality . . . ." *Vista Hill Found.*, 767 F.2d at 566 n.9 (quotations omitted).[5]

V

We turn next, therefore, to the remedy that the Board imposed for the violation. To remedy ASI's failure to consult with the Union before imposing terms, the Board ordered ASI to recognize the Union, and to pay back wages and benefits under the CBA from the time of the violation until ASI negotiated in good faith to a bargain or impasse.

Though a successor has a duty to bargain with an incumbent union before imposing terms when it hires an essentially intact bargaining unit from its predecessor, the successor has "no obligation to accept his predecessor's labor agreement." *Kallman*, 640 F.2d at 1103. Consequently, when employees are awarded back pay running from the time the successor acquires the business until it finally bargains to an agreement or an impasse pursuant to a duty to bargain imposed after lengthy proceedings, employees may receive far more than they would have if the violation had never occurred. Thus we have held that "to the extent that a back pay order requires payment at the higher rate for the entire period of ownership, it acts as a penalty." *Id.* Rather, "an appropriate back pay remedy cannot require [the successor] to pay the higher rate beyond a period allowing for a reasonable time of bargaining." *Id.*

This limitation on the period for which back pay may be awarded applies, however, only when it is clear that the

[5] The dissent asserts that "[t]here is no basis for the majority's asserted confidence that the Board would, on remand, reach the same result that the majority now embraces . . . ." Slip Op. at 383 n. 1. If our confidence is misplaced, as the dissent suggests, the Board is free to petition for rehearing on that ground.

successor "lawfully would not have agreed to the wage scale provided by the predecessor's labor agreement, and the resulting impasse would have resulted in reduced wages." *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1467 (9th Cir. 1997). Whether bargaining would have resulted in impasse had the violation not occurred will often be a matter of some uncertainty. In *New Breed* we held that any such uncertainty "should be resolved against the employer who discriminates," and we therefore placed the burden of persuasion on the successor to show that it would not have agreed to the higher wages. *Id.* at 1468.

In reaching this conclusion, we were persuaded by the Seventh Circuit's reasoning in *U.S. Marine*, 944 F.2d at 1321, that a successor should not benefit from an ambiguity that results from its own wrongdoing. Thus in *New Breed*, where the successor "failed to shoulder its evidentiary burden," we found that "the Board's grant of back pay based on the predecessor Union's pay scale restores as nearly as possible the employment situation that would have occurred absent" the unfair labor practice. *New Breed*, 111 F.3d at 1468-69. But where, as in *Kallman*, "[t]he facts demonstrate that [the successor] would not have agreed to union demands to pay the higher rate," the successor may not be required "to pay the higher rate beyond a period allowing for a reasonable time of bargaining." *Kallman*, 640 F.2d at 1103.

In fashioning its remedy in this case, the Board applied the presumption that an award of back pay and benefits under the repudiated bargaining agreement restores the status quo ante, but did not consider whether ASI had rebutted that presumption with evidence that it would have bargained to an impasse and imposed less favorable terms. *See New Breed*, 111 F.3d at 1468; *see also U.S. Marine*, 944 F.2d at 1323 ("[I]t is for the employer to demonstrate that it is not appropriate [to award back pay]. *U.S. Marine* has

failed to do so." (quotations, citations, and original alterations omitted)). Nor did the ALJ make any findings in this regard, as the ALJ did not award back pay and benefits under any exception to the *Burns* rule.

Those facts that are in the record and bear on this question are equivocal. The ALJ found that of the eight Aero unit employees originally hired on December 1, 1992, four received the same hourly wage they had previously been paid by Aero, two received significantly more, and two received significantly less. ASI provided less vacation time and paid holidays, however, and no medical or dental benefits. Nevertheless, the ALJ found little to indicate that ASI could have found a qualified workforce outside of Aero's ranks had AS1 not been able to come to terms with the incumbent union. The ALJ noted that ASI had rejected transferring employees from a machine shop that Brown owned in Gardena due to the unacceptable commute, and found that, to continue Aero's business, ASI needed a workforce with specialized skills that were not readily available in the marketplace.

The mere fact that ASI provided fewer benefits under the terms that it imposed provides little indication of what ASI might have agreed to had it fulfilled its obligation to bargain with the Union. The apparent unavailability of qualified workers outside of the Aero unit and the need to complete Aero's work in progress indicate that the Union might have brought significant negotiating power to the table. On the other hand, the fact of Aero's bankruptcy indicates that ASI might have been unwilling or even unable to continue to operate the business without significant labor concessions, and might have chosen to liquidate the company's assets rather than continue operating under the terms of the previous CBA.

Were the question regarding what would have happened had ASI recognized and bargained with the Union presented to us on a record that was ambiguous despite having been fully developed under the correct legal standard, we would resolve any uncertainty by affirming the Board's award under *New Breed*. *See New Breed*, 111 F.3d at 1468. Because the record was not fully developed on this point, however, we remand to permit ASI and the UAW to present evidence on whether ASI would have bargained to impasse and imposed terms, even if ASI had honored its obligation to bargain with the Union as it was required to do under the perfectly clear exception to the *Burns* rule.

VI

The Petition for Enforcement is GRANTED IN PART and REMANDED IN PART. Each party shall bear its own costs.

O' SCANNLAIN, Circuit Judge, dissenting:

The court's opinion frames the issue before us as "whether a successor employer has a duty to bargain with an incumbent union before unilaterally imposing terms when the employer hires its initial workforce from the ranks . . . of its predecessor." *Supra* at 3814. With respect, I suggest it is the wrong question. Worse yet, the majority compounds the error by giving the wrong answer to that question.

I

The National Labor Relations Board ("NLRB" or "Board") has applied to this court for the enforcement of its order, which declares in part that Advanced Stretchforming International ("ASI") violated the National Labor Relations Act (the "Act") by "unilaterally changing wages and benefits" without first bargaining with the union that had

previously represented the individuals whom ASI ultimately hired. The Board based this element of its order on its conclusion that ASI had "forfeited" its *otherwise unquestioned* right to set the initial terms and conditions of employment by peremptorily and impermissibly stating that there would be "no union" at its workplace. Naturally, the Board urges the enforcement of its order on this score; ASI is opposed. The majority agrees with the conclusion of the Board but does not endorse its logic.

The majority substitutes its own argument for that of the Board on the issue of whether ASI's imposition of novel terms and conditions of employment was unlawful. ASI's new terms and conditions violated the Act, the majority holds, not because ASI made its impermissible "no union" statement but because ASI had made it "perfectly clear" that it intended to man its workforce with the employees of its predecessor. *See supra* at 3822 ("Because we find that the perfectly clear exception to the *Burns* rule applies in this case, we need not take up the Board's application of the forfeiture doctrine . . . ."). The majority's reliance on its own argument is plainly impermissible, for, as the Supreme Court has "often held, the validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination." *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 631 n.31 (1980).

The majority asserts that the scope of our review need not be limited to determining the validity of the grounds actually advanced in the Board's order, because the majority can affirm the order with the " 'interpretation of a federal statute,'" *supra* at 3823 (quoting *Railway Labor Executives' Ass'n v. ICC*, 784 F.2d 959, 968 (9th Cir. 1986)), which is not a type of determination that the Board "'alone is authorized to make,'" *id.* (quoting *SEC v.*

Chenery Corp. (*Chenery II*), 332 U.S. 194, 196 (1947)). I must disagree. The majority is administering the Act—not interpreting it—with the unilateral declaration that ASI committed an "unfair labor practice" when it set the initial terms of employment and shortly thereafter hired eight of its predecessor's employees. If this were not the sort of determination that the Board is uniquely authorized to make, I would be hard pressed to conceive of what is.[1]

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[1] By way of contrast, our decision in *Railway Labor Executives* exemplifies the type of statutory interpretation that we may undertake in considering a novel basis on which to affirm an agency's order. In that case, an order of the ICC was challenged because the ICC refused to impose certain labor protections as a condition of its approval of the sale of a railroad line. *See* 784 F.2d at 961. A third party attempted to justify the ICC's refusal by arguing that Congress had not given the ICC any discretion to impose such protections. *See id.* at 969. Even though the ICC had not attempted to defend its action in this way, we noted that we could consider the third party's proposed justification for the ICUs order, because the issue of whether the ICC had the discretion at issue involved only the "interpretation of a federal statute." *Id.* Quite unlike the grounds advanced by the majority here, the novel basis we considered in *Railway Labor Executives* in no way involved the application of substantive terms of a statute for reasons not adopted by the agency in the order under review.

The majority's attempt to analogize the substitution of its own reasons for those of the NLRB in this case to the Fourth Circuit's decision in *North Carolina Commission of Indian Affairs v. United States Department of Labor*, 725 F.2d 238 (4th Cir. 1984), is unavailing. In that case, as in *Railway Labor Executives*, the reasoning at issue related to the scope of the agency's power under a federal statute. *See id.* at 240. As the Fourth Circuit took pains to note, "[t]he interpretation [was] wholly different from what it is in the case where Congress specifically entrusts an administrative agency, because of its special competence, with the task of . . . setting up standards or rules of conduct." *Id.* (quoting *Milk Transport v. ICC*, 190 F. Supp. 350, 355 (D. Minn. 1960)). In this case, however, the majority is, in fact, applying a "rule[ ] of conduct": A successor employer may not unilaterally set the initial terms of employment "when it hires its initial complement of workers entirely from the ranks of a represented unit." *Supra* at 3824.

The majority is on no more solid footing in suggesting that its alternative reasoning is merely meant to avoid the conversion of "'judicial review of agency action into a ping-pong game.'" *Supra* at 3824 (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969)). There is no basis for the majority's asserted confidence that the Board would, on remand, reach the same result that the majority now embraces, for the Board has repeatedly and notably declined to

This court is constrained, therefore, to consider the validity of the Board's stated reasons for concluding that ASI's conduct violated the Act. Because the court has not done so, it would be improvident for the court now to remand the Board's order for findings on the sustainability of the Board's desired remedy.

II

Considerations of administrative law aside, the court's holding practically eviscerates the rule of *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). In *Burns*, the Supreme Court established that a new employer is presumptively free to set the initial terms and conditions of employment without negotiating with a union, even if the new employer is the "successor" of an organization whose employees were represented by that union. *Id.* at 294 (noting that, even though the successor employer's terms *differed* from those of the old employer, "it does not follow that [the successor employer] *changed* its terms and conditions of employment when it specified the initial basis on which employees were hired" (emphasis added)). The Court has underscored that this presumption will be overborne only in "exceptional situation[s]." *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 47 n.14 (1987).

The *Burns* rule derives from the well-established principle that an employer's duty to bargain with a union does not arise until it transpires that a majority of the employer's workforce has chosen to be represented by that union. *See id.* at 295 (noting that the duty to bargain does not mature before it is "evident . . . that the bargaining representative represents a majority of the employees in the

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rely on the "perfectly clear" exception as a basis for its order—and there are good reasons for the Board's hesitation. *See infra*.

unit"). *See generally NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural, and Ornamental Iron Workers*, 434 U.S. 335, 344 (1978) (noting "the generally prevailing statutory policy that a union should not purport to act as the collective-bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of the employees in the unit"). Because the preference for union representation amongst the majority of employees cannot be determined before the composition of the workforce is established, the composition of the workforce generally cannot be established before the employees are hired, and employees cannot be hired without the employer's stating the initial terms of employment, it is pure syllogism that the employer cannot generally be held to negotiate with a union before the employer has set the initial terms of employment.

As the Court noted in *Burns*, however, there are some circumstances in which the composition of an employer's workforce *can* be established before the employees are hired. In these circumstances, the foregoing syllogism breaks down. One such circumstance arises when "it is perfectly clear that the new employer plans to retain all of the employees [of its predecessor]." *Burns*, 406 U.S. at 295. When the new employer's plan is "perfectly clear," the preference for union representation of the employer's future workforce is equally clear. Hence, the new employer can fairly be required to negotiate with the union before setting the initial terms of employment. This is the "perfectly clear" exception to the *Burns* rule.

The critical element of the "perfectly clear" exception is that of timing: *When* can an employer be said to have known of the composition of its future workforce and thus of its duty to bargain with a union? *See Burns*, 406 U.S. at 294 ("[T]here is no evidence that Burns ever unilaterally

changed the terms and conditions of employment it had offered to potential employees in June *after* its obligation to bargain with the union became apparent." (emphasis added)). Nothing in our case law suggests that the issue of timing has lost its relevance. Indeed, courts applying the "perfectly clear" exception continue to rely explicitly on the fact that the successor employer plainly intended--prospectively--to retain the predecessor's employees before setting the initial terms of employment. *See, e.g., Canteen Corp. v. NLRB*, 103 F.3d 1355, 1363 (7th Cir. 1997) (noting that the NLRB had found that "'the [new employer] had effectively and clearly communicated to the Union its *plan* to retain the predecessor employees'" (emphasis added)); *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 679 (9th Cir. 1980) (noting that the statements of the new employer's president supported the NLRB's conclusion "that it was 'perfectly clear' that [the employer] *intended* to staff the plant with a sufficient number of [predecessor] employees to trigger a bargaining obligation" (emphasis added)).

Applying the "perfectly clear" exception to this case thus requires evidence establishing that ALI planned--before setting the initial terms of employment--to hire at least the majority of its employees from the workforce of its predecessor, Aero Stretch, Inc. ("Aero"). *See Bellingham*, 626 F.2d at 678-79. Neither the Board nor the administrative law judge ("ALJ") found such evidence.[2] Nevertheless, the majority does. *See supra* at 3821 ("The circumstances surrounding the takeover in this case strongly indicate ASI's intent to hire its initial workforce from the ranks of its predecessor.") The evidence on which the majority relies, however, falls far short of establishing the

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[2] This alone, of course, should foreclose our consideration of the matter, for, as an appellate court, we are generally not authorized to find facts at this stage.

existence of ASI's plan. The majority first observes that an agent of ASI told Aero's employees that they should report to the plant on the first day of ASI's operation if they wanted to apply to work for ASI. An invitation to apply for work, however, is far from a statement of the employer's intention to hire the applicant. The majority also notes that ASI's agent stated that "ASI intended to hire some Aero workers immediately, and others as work became available." *See supra* at 3821-22. Because ASI's intent to hire *some* Aero workers cannot establish that former Aero workers would constitute the majority of ASI's workforce, this evidence, too, is irrelevant. *Cf. Bellingham*, 626 F.2d at 679 (relying on the successor employer's statement that it would "employ *all but 'some'* of the [predecessor's] employees" (emphasis added)). The majority also relies on the fact that "there is no evidence that ASI interviewed any non-Aero employees" immediately. *See supra* at 3822. That no evidence of such interviews appears in the record hardly establishes that such interviews did not occur. Furthermore, the majority's reliance on *a lack* of evidence for ASI's position suggests – wrongly – that a successor, barring evidence to the contrary, *is presumed* to have made "perfectly clear" a plan to hire most of its employees from its predecessor.

All the "evidence" marshaled by the majority, then, boils down to ASI's actual recruitment practices. *See supra* at 3822 ("ASI then hired all eight of its initial unit employees from Aero's ranks."). That an employer ultimately *did* something, however, does not establish that what the employer *would* do was "perfectly clear." *See Burns*, 406 U.S. at 295 ("[I]t may not be clear *until* the successor employer *has hired* his full complement of employees that he has a duty to bargain with a union." (emphases added)). The majority attempts to sidestep this embarrassingly elementary point by noting that we relied in *Bellingham* on an employer's ultimate hiring practices in

evaluating the earlier transparency of its plans. *See supra* at 3822 (citing *Bellingham*, 626 F.2d at 679). *Bellingham* posed a different issue, however. In that case, we were called upon to determine whether substantial evidence supported the Board's conclusion that an employer's hiring plans had been "perfectly clear." We were not conducting de novo review, and we did not state that we would have reached the same conclusion as the Board if we were. Moreover, the facts in *Bellingham* presented other probative evidence in addition to the employer's ultimate recruitment practices. The majority here marshals no additional probative evidence whatsoever.

The majority sets the standard for applying the "perfectly clear" exception so low that the exception can only swallow the rule. This outcome does not merely flout the decision of the Supreme Court in *Burns*. It also invites every successor employer to discriminate against the employees of its predecessor. Anything else would only increase the successor employer's risk of being found to have plainly intended to hire its predecessor's employees all along—and the concomitant risk of having retroactively forfeited its presumptive (and valuable) right to set the initial terms and conditions of employment.

The majority ignores basic tenets of administrative law, flouts Supreme Court precedent, and worsens the plight of American workers facing the insecurity of a failed employer. I respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-71047

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AMALGAMATED LOCAL UNION NO. 509, AFL-CIO,

Intervenor,

v.

ADVANCED STRETCHFORMING INTERNATIONAL, INC.

Respondent.

JUDGMENT

Before:ROBERT BOOCHEVER, DIARMUID F. O'SCANNLAIN and A. WALLACE TASHIMA, Circuit Judges.

THIS CAUSE came to be heard upon an application of the National Labor Relations Board for the enforcement of an order in Board Case No. 21-CA-29104, issued by it against Respondent, Advanced Stretchforming International, Inc., Gardena, California, its officers, agents, successors, and assigns, on April 25, 1997. The Court heard argument of respective counsel on April 13, 1999, and has considered the briefs and transcript of record filed in this case. On April 4, 2000, the Court, being fully advised of the premises, handed down its opinion granting in part and remanding in part enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Respondent, Advanced Stretchforming International, Inc., Gardena, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling potential applicants for employment that it intends to operate with no union when it is obliged to recognize and bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Amalgamated Local Union No. 509, AFL-CIO.

(b) Polling its employees concerning representation by the Union.

(c) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees including quality control inspectors, maintenance mechanics, metal fabricators, extrusion formers, stretch press operators,

warehousemen, assemblers, machinist trainees and machine operators employed at the Respondent's facility located at 18620 South Broadway, Gardena, California; excluding office clerical employees, confidential employees, supervisors and guards as defined in the Act.

(d) Changing the terms and conditions of employment of employees in the above unit without notice to and bargaining with the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act ("the Act").

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Union in writing that it recognizes that labor organization as the exclusive representative of its employees under Section 9(a) of the Act and will bargain with it concerning the terms and conditions of employment for employees in the appropriate unit.

(b) On request, bargain with the Union concerning terms and conditions of employment of unit employees.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(d) Within 14 days after service by the Region, post at its facility in Gardena, California, copies of the

attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 21 of the National Labor Relations Board (Los Angeles, California), after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendancy of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 11, 1992.

(e) Within 21 days after service by the Region, file with the said Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED AND ADJUDGED that this case be and it hereby is remanded to the Board for further proceedings consistent with the Court's opinion.

IT IS FURTHER ORDERED that each party shall bear its own costs.

Endorsed, Judgment Filed and Entered

/s/ Cathy A. Catterson
Cathy A. Catterson

APPENDIX D

NATIONAL LABOR RELATIONS BOARD
(N.L.R.B.)
No. 509, AFL-CIO
Case 21-CA-29104
April 25, 1997

Advanced Stretchforming International, Inc.
And
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Amalgamated Local Union

DECISION AND ORDER BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The only issue raised by the exceptions[1] in this case is whether the Respondent, as a successor employer obligated to recognize the Union's continuing status as a collective-bargaining representative, had the legal right to establish unilaterally its initial terms and conditions of employment for bargaining unit employees. The judge found that the Respondent had this right under the standard set forth in *NLRB v. Burns Security Services,* 406 U.S. 272 (1972).

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[1] On November 18, 1994, Administrative Law Judge William L. Schmidt issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed an answering brief and the Charging Party filed a reply brief. The Service Employees International Union filed an amicus statement.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order only to the extent consistent with this Decision and Order.[2] For the reasons which follow, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its employees' wages and other terms and conditions of employment at the time of their hire.

Two predecessor employers engaged in stretch forming operations at the Gardena facility involved in this case. During the period that the first predecessor operated the enterprise, the Union was recognized as the exclusive collective-bargaining representative for the production and maintenance employees. The second predecessor, Aero Stretch, Inc. (Aero), acquired the operation in 1990 and negotiated an agreement with the Union effective from August 19, 1991, through August 19, 1994. In June 1992,[3] Aero declared bankruptcy but continued to operate the facility through November 30. When Aero ceased operations, 17 unit employees remained. On November 19, Steven Brown purchased Aero's assets. On December 1, Brown incorporated the Respondent.

As required by order of the Bankruptcy Court, Aero terminated all of its employees on November 30. On that day, according to the credited testimony, Eric Cunningham, Aero's operations director (an agent of the Respondent and formally hired by the Respondent on December 1 as general manager), told the employees that a majority of them would be hired by the Respondent but there would be no union and

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[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] All dates are in 1992 unless otherwise indicated.

no seniority. On December 1, the Respondent formally employed the entire management, professional and administrative staff, and eight of the unit employees terminated by Aero on November 30. The Respondent hired no employees from other sources at that time.

On December 1, all employees interviewed for employment were informed that they would be working under new terms and conditions which were subject to change, that the Respondent was not assuming the collective-bargaining agreement, and that they would be employed on an at-will basis. The Respondent's initial terms provided for less vacation time and fewer paid holidays than employees had received under Aero. In contrast to Aero, the Respondent provided no medical or dental benefits. Of the eight unit employees hired by the Respondent on December 1, four received the same hourly wage rate they had received at Aero, two received wage increases that exceeded a dollar per hour, and two received wage decreases that were more than a dollar per hour.

The judge found that the Respondent violated Section 8(a)(1) by telling employees at the November 30 meeting that there would be no union. This statement was a clearly unlawful message to employees that the Respondent would not permit them to be represented by a union.[4] Relying on *Burns*, as interpreted by the Board majority in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the judge nevertheless found that the Respondent did not violate Section 8(a)(5) of the Act

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[4] *Love's Barbeque Restaurant*, 245 NLRB 78, 124 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981). The Respondent does not except to this unfair labor practice finding or to the judge's finding that it subsequently violated Sec. 8(a)(5) and (1) of the Act by polling unit employees concerning representation by the Union and by thereafter refusing to recognize and bargain with the Union.

by unilaterally setting different terms and conditions of employment for the unit employees.

The judge noted that the Supreme Court in *Burns* recognized certain circumstances which require that a successor employer bargain with the union before changing the terms and conditions of employment of the unit employees. In particular, the Supreme Court stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.[5]

The judge went on to find that, in *Spruce Up*, the Board limited the application of the *Burns* "perfectly clear" caveat to cases "in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer ... has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."[6]

The judge concluded that the Respondent clearly manifested its intention to establish its own initial terms of employment at the same time that *Cunningham* announced the Respondent's intention to hire a majority of Aero unit

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[5] 406 U.S. 272, 294-295.

[6] 209 NLRB 194, 195 (fn. omitted).

employees. Specifically, the judge found that the mention that employees would lose their seniority was a sufficient signal to employees that the terms and conditions of employment would be different under the Respondent's operation. For these reasons, the judge found that the Respondent did not forfeit its unilateral right under *Burns* to establish the initial employment terms for the successor employees by misleading unit employees about its intentions.

Unlike the judge, we do not find an application of *Spruce Up*'s interpretation of the *Burns* caveat to the facts of this case to be determinative of the legality of the Respondent's conduct.[7] Instead, we rely on another well-established exception to the right of a *Burns* successor to set initial terms and conditions of employment. In *U.S. Marine Corp.*, 293 NLRB 669, 672 (1989), for example, the Board held that an employer—like the Respondents – that unlawfully discriminates in its hiring in order to evade its obligations as a successor does not have the *Burns* right to set initial terms of employment without first consulting with the Union. The Respondents forfeited any right they may have had as a successor to impose initial terms when they embarked on their deliberated scheme to avoid bargaining with the Union by their discriminatory hiring practices.

This equitable doctrine, which arose in the context of defining an appropriate remedy for an employer that sought to avoid the successor's bargaining obligation by refusing to hire applicants from the predecessor's unionized work force,[8] is equally relevant to the allegation here of unlawful

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[7] We therefore do not rely on the judge's Spruce Up analysis. Moreover, Chairman Gould does not agree with the Spruce Up majority's interpretation of the Burns caveat. See the Chairman's concurring opinion in *Canteen Co.*, 317 NLRB 1052, 1054-1055 (1995).

[8] *See Love's Barbeque Restaurant, supra.*

unilateral changes. The fundamental premise for the forfeiture doctrine is that it would be contrary to statutory policy to "confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred." *State Distributing Co.*, 282 NLRB 1048, 1049 (1987). In other words, the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employee's collective-bargaining representative and enter into good-faith negotiations with that union about those terms and conditions.

Of course, unlike in *U.S. Marine, Love's Barbeque,* and *State Distributing Co.,* there is no allegation in this case that the Respondent unlawfully discriminated in its hiring practices. In fact, it looked exclusively to the predecessor's unionized work force and hired a majority of Aero's unit employees in forming its own initial employee contingent. Furthermore, for purposes of this litigation, the Respondent conceded that it was a *Burns* successor bound to recognize the Union when plant operations resumed on December 1.

At the time of successorship, however, the Respondent did not conduct itself like a lawful *Burns* successor. At this unsettling time of transition, when "a union is in a peculiarly vulnerable position" and employees "might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor,"[9] the Respondent unlawfully declared through Cunningham to all Aero employees that there would be no union for those whom it hired. Fourteen days later, the Respondent relied on the results of an employee poll tainted by Cunningham's statement when it

[9] *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27, 39-40 (1987).

refused to bargain with the Union and thereafter refused to recognize the Union as the unit employees' representative.

A statement to employees that there will be no union at the successor employer's facility blatantly coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment. Nothing in *Burns* suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate initial terms and conditions of employment. A statement that there will be no union serves the same end as a refusal to hire employees from the predecessor's unionized work force. It "block[s] the process by which the obligations and rights of such a successor are incurred." *State Distributing,* 282 NLRB at 1049.

In sum, we hold that by declaring at the outset that there would be no union at its facility, the Respondent, like a successor that discriminatorily refuses to hire a majority of its predecessor's employees in order to avoid recognizing and bargaining with a union, forfeited its *Burns* right to set initial terms and conditions of employment without first bargaining with the Union. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing wages and benefits when it commenced operations.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 5 of the judge's Conclusions of Law.

> "5. By modifying the terms and conditions of employment of unit employees without prior notice to the Union and without affording the Union an opportunity to bargain over these matters, the

Respondent violated Section 8(a)(5) and (1) of the Act."

AMENDED REMEDY

On request, the Respondent shall bargain with the Union concerning wages, health and welfare benefits, vacations, holidays, and other terms and conditions of employment. Furthermore, in order to remedy the Respondent's unlawful unilateral changes, we shall order the Respondent, on request of the Union, to rescind any changes in employees' terms and conditions of employment unilaterally effectuated and to make the employees whole by remitting all wages and benefits that would have been paid absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse. As the Seventh Circuit stated in enforcing the Board's decision in *U.S. Marine*, a remedial measure of this kind not only is "designed to prevent [the Respondent] from taking advantage of its wrongdoing to the detriment of the employees ... [but a] return to the status quo ante at least allows the bargaining process to get under way." 944 F.2d at 1322-1323. Employees shall be made whole in the manner prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970, enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

The Respondent shall also make whole its unit employees by making all delinquent employee benefit fund contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contribution, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980),

enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service, supra*, with interest as prescribed in *New Horizons for the Retarded, supra*.[10]

ORDER

The National Labor Relations Board orders that the Respondent, Advanced Stretchforming International, Inc., Gardena, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Telling potential applicants for employment that it intends to operate with no union when it is obliged to recognize and bargain with International Union, United Automobile Aerospace and Agricuitural Implement Workers of America (UAW), Amalgamated Local Union No. 509, AFL-CIO.

(b) Polling its employees concerning representation by the Union.

(c) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees including quality control inspectors, maintenance mechanics, metal fabricators, extrusion formers, stretch press operators, warehousemen, assemblers, machinist trainees and machine

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[10] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

operators employed at the Respondent's facility located at 18620 South Broadway, Gardena, California; excluding office clerical employees, confidential employees, supervisors and guards as defined in the Act.

(d) Changing the terms and conditions of employment of employees in the above unit without notice to and bargaining with the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Union in writing that it recognizes that labor organization as the exclusive representative of its employees under Section 9(a) of the Act and will bargain with it concerning the terms and conditions of employment for employees in the appropriate unit.

(b) On request, bargain with the Union concerning terms and conditions of employment of unit employees.

(c) On request, cancel changes in terms and conditions of employment of unit employees unilaterally effectuated and make employees whole by remitting all wages and benefits that would have been paid absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse, in the manner set forth in the amended remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination

and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Gardena, California, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 11, 1992.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER HIGGINS, concurring.

I agree with my colleagues that, under the circumstances of this case, the Respondent violated Section 8(a)(5) and (1) by unilaterally setting the initial terms and conditions of employment for the unit employees. I do not, however, adopt all of their analysis.

Under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), a successor employer is ordinarily free to establish initial terms and conditions for unit employees. The majority finds that the Respondent, an admitted *Burns* successor, forfeited this right because it unlawfully declared that there would be no union at its facility. It did so at the time that it announced that it would hire a majority of the predecessor's employees under altered terms and conditions. In their view, this 8(a)(1) statement was antithetical to the Respondent's *Burns'* obligation to bargain in good faith and was analogous to situations where successors unlawfully and discriminatorily refuse to hire a majority of its predecessors' employees. I disagree with this view.

In my view, the mere 8(a)(1) statement would not warrant forfeiture of the Respondent's *Burns'* rights to set initial terms and conditions for its employees.

Although unlawful, I do not find that such a statement, in isolation, establishes that an employer has "embarked on [the] deliberate scheme to avoid bargaining with the Union by ... discriminatory hiring practices,"[1] or that it has "unlawfully blocked the process by which the obligations and rights of ... a successor are incurred." *State Distributing Co.*, 282 NLRB 1048, 1049 (1987). Nor do I agree with my colleagues that the statement is analogous to a discriminatory refusal to hire. *Cf Love's Barbeque*

[1] *U.S. Marine Corp.*, 293 NLRB 669, 672 (1989).

Restaurant, 245 NLRB 78 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

Here, however, the Respondent did not merely utter the unlawful "no union" statement; it acted on it. Within days of this 8(a)(1) statement, and its hire of the predecessor's employees, the Union repeatedly demanded that the Respondent recognize and bargain with it. Rather than accede to these demands, as it was obligated to do, the Respondent promptly conducted an unlawful of employee sentiment.[2] Further, within 2 weeks of its unlawful statement, the Respondent expressly refused to recognize the Union, in violation of Section 8(a)(5) and (1). Thus, the Respondent, by both act and word, violated Section 7 rights and dishonored its *Burns* obligations. Having done so, it cannot claim the privilege of setting initial terms and conditions for the unit employees.

Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) by unilaterally setting the initial terms and conditions of the unit employees.[3]

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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[2] *Struksnes Construction Co.*, 165 NLRB 1062 (1967).

[3] In all other respects, I agree with my colleagues.

WE WILL NOT tell employees or potential applicants that we intend to operate with no union when we are obligated to recognize and bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Amalgamated Local Union No. 509, AFL-CIO.

WE WILL NOT poll employees concerning representation by the Union and WE WILL NOT refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All production and maintenance employees including quality control inspectors, maintenance mechanics, metal fabricators, extrusion formers, stretch press operators, warehousemen, assemblers, machinist trainees and machine operators employed at our facility located at 18620 South Broadway, Gardena, California; excluding office clerical employees, confidential employees, supervisors and guards as defined in the Act.

WE WILL NOT change terms and conditions of employment of the employees in the above unit without notice to and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify the Union in writing that we recognize it as the exclusive representative of our employees under Section 9(a) of the Act and will bargain with it concerning the terms and conditions of employment for our employees in the appropriate unit.

WE WILL, on request, bargain with the Union concerning terms and conditions of employment of unit employees.

WE WILL, on request, cancel changes in terms and conditions of employment of unit employees unilaterally effectuated and make employees whole by remitting all wages and benefits that would have been paid absent our unlawful conduct, until we negotiate in good faith with the Union to agreement or to impasse.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADVANCED STRETCHFORMING INTERNATIONAL, INC.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AMALGAMATED LOCAL UNION NO. 509, AFL-CIO.

Case 21-CA-29104

JD(SF)-81-94

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS HEREBY ORDERED, pursuant to Section 102.45 of National Labor Relations Board's Rules and Regulations, that the above- entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D.C., November 18, 1994

By direction of the Board:

JOHN C. TRUESDALE

Executive Secretary

APPENDIX F

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE
JD(SF)-81-94 Gardena, CA
Case 21-CA-29104

ADVANCED STRETCHFORMING INTERNATIONAL, INC.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AMALGAMATED LOCAL UNION NO. 509 AFL-CIO.

Yvette H. Hollida-Curtis and Peter Tovar, Attys., NLRB Region 21, Los Angeles, CA, for General Counsel.

Margo A. Feinberg, Atty., with Henry, M. Willis, Atty., on the brief, of Schwartz, Steinsapir, Dohrmann & Sommers, Los Angeles, CA, for Charging Party.

Thomas H. Reilly, Atty., with Richard C. White, Atty., on the brief, of O'Melveny & Meyers, Newport Beach, CA, for Respondent.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge: The General Counsel alleges here that Advanced Stretchforming International, Inc. (Respondent or Company), as a successor employer, refused to recognize International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Amalgamated Local Union No. 509, AFL-CIO, (Union or Charging Party), and bargain over the initial terms and conditions of employment, both in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). The General Counsel also alleges that Respondent polled its employees concerning Union representation in violation of Section 8(a)(1) and (5), and that it told its predecessor's employees that it intended to operate without a union in violation of Section 8(a)(1).

The Union filed the unfair labor practice charge on December 11, 1992.[1] On April 30, 1993, the Regional Director for Region 21 of the National Labor Relations Board (Board or NLRB) issued a complaint and notice of hearing. Respondent timely answered the complaint denying that it engaged in the unfair labor practices alleged.

I heard this case over the course of four days between September 23 and October 14, 1993, at Los Angeles, California. Having now carefully considered the record, the demeanor of the witnesses while testifying, and the parties' post-hearing briefs, I conclude that Respondent violated the Act in certain respects based on the following:

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[1] All dates below refer to the 1992 calendar year unless shown otherwise.

Findings of Fact

I. Jurisdiction and Overview

Respondent, a corporation engaged in the business of stretchforming structural body components used in the aerospace industry, commenced operations from its facility located at Gardena, California on December 1. Based on an annual projection of its operations between December 1 and April 30, 1993, when the complaint issued, Respondent's direct outflow will annually exceed the dollar volume standard established by the Board for exercising its statutory jurisdiction over nonretail enterprises. Accordingly, I find Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Two predecessor employers engaged in stretchforming operations at the Gardena facility for more than 20 years prior to its acquisition by Respondent. During the period that the predecessor Aeronca owned and operated the enterprise, the Union was recognized as the collective bargaining representative for the plant's production and maintenance employees and a series of successive collective bargaining agreements ensued until the operation was acquired in early 1990 by Aero Stretch, Inc. (Aero). Thereafter, Aero and the Union negotiated a successor agreement effective from August 19, 1991, through August 19, 1994.

In June, Aero filed a Chapter 11 bankruptcy proceeding and continued to operate the facility through November 30. Throughout this period, Aero gradually laid off employees so that by November 30 when Aero ceased operations, 17 unit employees remained. Aero made no attempt to secure court relief from the collective bargaining agreement. Instead, it unilaterally ceased payments for employee health benefits in October which resulted in the

cancellation of health benefits in mid-November, failed to implement incremental wage increases due to employees under the collective bargaining agreement, terminated contributions to an employee 401 (K) plan provided for under the agreement, and generally disregarded contractual job classifications in making work assignments. The Union took no action to contest these modifications but Union agent Dwaine LaMothe contacted several Aero officials in the post-bankruptcy period to inquire about Aero's financial condition and to explore the reported sale prospects of the enterprise.

During the summer and fall Aero unsuccessfully courted several prospective buyers. Eric Cunningham, Aero's operations director, advised employees monthly about Aero's efforts to locate a buyer and the status of the bankruptcy proceeding. After Aero's principal creditor rejected the most recent buyout proposal at a November 19 bankruptcy hearing, the Bankruptcy Court converted the Aero's bankruptcy to a Chapter 7 proceeding, auctioned its assets, and ordered Aero to terminate its employees and close on November 30. Apparently, Aero anticipated this development because it had begun to coordinate the removal of customer tools and dies from the plant prior to the November 19 hearing.

Steven Brown, a Southern California, entrepreneur, submitted the successful bid for Aero's assets through an agent at the November 19 hearing. Although Brown ostensibly purchased the assets with the intention of liquidating them forthwith, he quickly decided to continue the Gardena stretchforming operation. By December 1, Brown incorporated Respondent, secured the financing required to close the bankruptcy sale, and invited Aero's employees to submit employment applications.

As required by the November 19 Bankruptcy Court order, Aero terminated all of its employees on November 30. The following day Respondent formally employed the entire management, professional and administrative staff terminated by Aero on the previous day, including John Rockwood, Aero's president who was retained as Respondent's president, and eight unit employees. No unit employees were hired from other sources at this time. During their employment interviews, the employees were informed of new terms and conditions of employment which differed from Aero's terms. This staff commenced work immediately to complete Aero's work in progress and to prepare for new work of like kind.

On December 3, 7 and 11, LaMothe sent letters to Brown demanding recognition. Before responding to the last demand letter on December 14, Respondent polled its employees concerning continued representation by the Union and the employees who participated in the poll voted against continued representation. Thereafter, Brown's counsel wrote LaMothe rejecting the Union's demand on the ground that Brown had a good faith doubt of the Union's majority standing and on the further ground that the demand was premature because Respondent planned to add "quite a few new production-type employees in the near future."[2]

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[2] Respondent does not defend its December 14 refusal to recognize the Union on the ground that it had not yet employed a representative complement of employees. Between December 1 and the date of the hearing Respondent had employed 11 additional unit employees in the following sequence: two in January; three in March; three in April; two in June; and one in August. One non-Aero employee was hired in March and three more non-Aero employees were hired in June and August. At least one employee, Duane Mooney, hired in April worked only one week. I find this evidence would not support a "representative complement" defense if made. *NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375 (9th Cir. 1987).

II. The Alleged Unfair Labor Practices

A. Setting Initial Terms of Employment

In its brief, Respondent concedes that it is a succĕssor employer under the standards enunciated in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). As Respondent continued to engage in the same business at the same location utilizing all of its predecessors managerial, supervisory and administrative personnel, and only unit employees employed by its predecessor, I find Respondent is a successor employer under *Burns*.

In *Burns*, the Supreme Court affirmed the court of appeals refusal to enforce a Board Order requiring that employer to adopt its predecessor's collective bargaining agreement. Having refused to adopt the rationale for the Board's affirmative order, the Court then addressed the Board's general characterization that a successor employer's bargaining obligation was analogous to an employer's obligation to refrain from unilaterally changing wages and other benefits during the period between collective-bargaining agreements.

Justice White, on behalf of the *Burns* Court, wrote that it was "difficult to understand how Burns could be said to have changed unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit ...." Although Burns may have employed workers on terms different than those of its predecessor, Justice White noted that "it does not follow that Burns changed its terms and conditions of employment when it specified the initial basis on which employees were hired ...." However, he observed that "[a]lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly

clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Later the Supreme Court made clear that this caveat concerning the duty to bargain over the initial terms refers to the "exceptional situation" whereas a successor's right to unilaterally establish its initial terms is the "standard situation." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1986), at fn.15.

In *Spruce Up*, 209 NLRB 194 (1974), enfd per curiam 529 F.2d 516 (4th Cir. 1975), the Board announced its intention to limit the application of the Burns caveat to cases "in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer ..has failed to clearly announce its intent to establish a new. set of conditions prior to inviting former employees to accept employment." [Emphasis added] The Board reaffirmed this approach in *Fremont Ford*, 289 NLRB 1290 (1988). There it stated that "[s]ince *Spruce Up* the Board has adhered to this distinction based on when the successor employer announces its offer of different terms of employment in relation to its expression of intent to retain the predecessor's employees unless the successor has misled them." See also Level, a Division of Worcester Mfg., 306 NLRB 218 (1992).

Underlying the General Counsel's allegation that Respondent unilaterally changed the wages and benefits contained in the Aero collective bargaining agreement when it commenced operating the business is the contention that the facts here merit the conclusion that this case fits the

Burns caveat. The relevant facts and my conclusions on this issue follow.

1. The Evidence

The unit employees first learned of potential employment opportunities with Respondent at a November 30 meeting conducted by Cunningham. LaMothe happened to be at the plant that day and listened to Cunningham address the assembled employees about their future. LaMothe claims that Cunningham told the employees at that time that a majority of the employees would be hired by the new buyer's company (Respondent) but "there would be no union and no seniority and the new company was not responsible for any of the previous administrative claims." One employee, LaMothe claims, asked why there would be no union. Purportedly, Cunningham stated that Aero had lost several contracts because of the Union wages and benefits and, therefore, the plant could not afford to operate with the Union. Tyron Bennett, the unit chairperson, recalled that Cunningham told the employees on this occasion that they would all be terminated but a majority would be rehired. He claims that Cunningham stated that "there will be no union, no seniority, no nothing...."

Howard Venard, Aero's production supervisor who was hired as Respondent's production manager on December 1, testified that Cunningham told the employees at the November 30 meeting that all would be terminated but they should report for interviews the following morning at their regular work time. He further testified that Cunningham told employees that the new company "wasn't going to abide by the Union contract and that there wouldn't be any seniority...." Venard explained that he interpreted Cunningham's "Union contact" statement to mean that there

would be no union at the new company and, consequently, in a pre-hearing statement he provided to the General Counsel, Venard stated that Cunningham told the employees on this occasion that there would be "no union."

Cunningham's acknowledges that he met with the employees on this occasion and told them that they would all be terminated from Aero effective at the end of that workday. At Brown's instruction, Cunningham further advised the employees that, if they were interested in working for the new company, they should turn in the previously distributed employment applications if they had no already done so and report to the plant at their regular time the following morning to interview for employment. He stated that some of the employees would be hired immediately and others would be employed later after the new company acquired more work. In agreement with the others who testified, Cunningham said that he told the employees, in effect, that they would not be credited with their prior seniority at the facility if they were employed by the new company. However, Cunningham denied that he told the employees that there would be no union. Instead, he claims that he told the employees either on this occasion or at another meeting on November 20 that the buyer would not assume the Union contract.[3]

There is no evidence that Brown spoke with any of the plant employees or Union representatives nor is there any evidence that Brown caused any written statement concerning Respondent's initial terms and conditions of

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[3] Allegedly, Brown told Cunningham on November 20 that he would not assume the Union contract and Cunningham claims to have so informed the employees. However, this account is inherently inconsistent with Brown's claim that he did not decide until about a week later to continue the operation rather than liquidate the equipment until about a week later while on a trip to Texas and, seemingly, would have no reason to address the Union contract question as early as November 20.

employment to be published prior to December 1. On December 1, each individual interviewed for employment with Respondent signed the following statement:

> I UNDERSTAND THAT I WILL BE WORKING UNDER NEW TERMS AND CONDITIONS WHICH IS NOT A CONTRACT AND IS SUBJECT TO CHANGE.
>
> NEW COMPANY IS NOT ASSUMING COLLECTIVE BARGAINING AGREEMENT.
>
> YOU MAY BE EMPLOYED BY NEW COMPANY ON AN AT WILL BASIS.
>
> DETAILED LIST OF TERMS AND CONDITIONS IS TO FOLLOW.

Brown interviewed and hired Cunningham as the Respondent's general manager early on December 1. Pursuant to Brown's instructions, Cunningham conducted most of the rest of the interviews and claims, without contradiction, to have informed those interviewed that the benefit terms would be identical to those offered to Cunningham which Brown derived from the employee handbook effective at Camarillo Dynamics, another company Brown owns near Ontario, California.

Among other benefits, Respondent's initial terms provided for less vacation time and fewer paid holidays than had been in effect at Aero. Contrary to Aero, Respondent provided no medical or dental benefits for unit employees. Of the 8 unit employees hired by Respondent on December 1, four were employed at the same hourly wage rate they received at Aero, two received wage increases which exceeded a dollar per hour, and two received wage decreases which were more than a dollar per hour.

2. Further Findings and Conclusions

The General Counsel and the Charging Party argue that Respondent's obligation to bargain with the Union arose before it established its initial terms of employment and, hence, it was obliged to negotiate those terms with the Union. They contend that once Respondent made the decision secure its work force from among the Aero employees the Burns caveat applied and Respondent was no longer at liberty to unilaterally establish new terms and conditions of employment. In my judgment, this theory is at odds with *Burns* and *Spruce Up*.

In ordinary circumstances, a successor employer would likely look to the existing work force to staff an enterprise unless exigencies dictated otherwise. Nothing here suggests that Brown was in a position to secure a work force elsewhere. To be sure, he owned a machine shop in the Los Angeles metropolitan area but at such a distance that the two or so Camarillo employees approached by Brown about transferring to the Gardena facility declined a transfer because of the lengthy commute involved. Moreover, Respondent's operation obviously required a work force with certain specialized skills which were most readily available from Aero's workers. Here there is no doubt but that Brown was a small entrepreneur venturing into a new enterprise bearing only a modicum of similarity to his other companies. Hence, the likelihood that he would have a readily available work force apart from that which existed at Aero would be unlikely.

These exigencies, in my judgment, confuse the General Counsel and the Charging Party. Unlike a nationwide enterprise such as Burns which employs semi-skilled employees, or less, by the thousands and regularly shifts employees from one location to another, Brown

ventured into a highly specialized industry engaged in the manufacture of airplane skins and related structural paraphernalia where, it should be anticipated, he would give preference to the predecessor's work force as a practical business judgment. Hence, Brown's decision, whether made in the bankruptcy courtroom or later as he contends, to operate the Gardena plant using employees from the existing workforce can hardly be considered an extraordinary circumstance requiring application of the *Burns* caveat.

On the contrary, the *Spruce Up* doctrine essentially requires an examination as to whether, once Brown decided to operate the business with the predecessor's workers, he or his agents led the Aero employees to believe that they would be employed under the existing wages, hours and conditions of employment, or, at the very least, said nothing about any new terms and conditions of employment. The evidence here plainly shows that the General Counsel has not met the *Spruce Up* criteria.

Although I agree, as the General Counsel and the Charging party contend, that Cunningham was Brown's agent even before any formal hiring process on December 1, nothing in Cunningham's November 30 statements to the Aero employees should have lead them to expect that there would be no changes in their terms and conditions of employment. Instead, the contrary is true. The mere mention that employees would forfeit their seniority is a clear signal that, when employed by the Brown enterprise, things would be different. Moreover, the form employees were required to sign the following morning during the employment interviews further articulated Respondent's intention to establish its own initial terms of employment. Hence, I find that this intention was clearly made known to the employees contemporaneous with Respondent's announcement of employment opportunities. I find,

therefore, that Respondent never forfeited its right to unilaterally establish its initial employment terms.

The principal authorities cited by the General Counsel and the Charging Party, *Helnick Corp.*, 301 NLRB 128 (1991) and *A-1 Schmidlin Plumbing*, 284 NLRB 1506 (1987), do not support a different conclusion. In *Helnick* the ALJ specifically found that the successor employer "informed employees that they could all expect to be retained...[without discussing] in any detail with any employee at that time the numerous changes in fringe benefits which he later made." 301 NLRB at p. 134. Similarly, in *Schmidlin* the successor employer made no mention of any changes in the terms and conditions of employment when he told the predecessor's employees that the successor would hire them if they wanted to work for the new company. Indeed, the L.A.X. Medical Clinic citation in footnote 3 of *Schmidlin* clearly shows that the Board relied on the employer's silence when offering employment to the predecessor's employees as the basis for imposing the status quo remedy. This construction of *Helnick* and *Schmidlin* is consistent with the Board's continued application of the *Spruce Up* doctrine in the later *Level* case.

As found above, Respondent, by Cunningham, signaled employees concerning changes in employment terms at the very time he announced that there would be employment opportunities. In my judgment, it is of no moment that he did not detail the extent of the changes as he did the following morning during the employment interviews. His unequivocal statement concerning the treatment of seniority on November 30 is enough to preclude any finding that Respondent was silent, or misled the Aero employees into believing there would be no changes. That being the case, I read *Spruce Up*, to compel the conclusion, which I have reached, that the changes in the terms and

conditions of employment which occurred on December 1 were lawful. Accordingly, the recommended order will provide for the dismissal of the allegation that Respondent violated Section 8(a)(1) and (5) by that conduct.

However, I credit the claim by Bennett and LaMothe that Cunningham told employees at the November 30 meeting that there would be no union at the new company and find that this remark violated Section 8(a)(1) as alleged. *Level, supra.; see also Love's Barbeque*, 245 NLRB 78, 124 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981). Their account is essentially corroborated by Venard's pre-hearing statement, prepared in the presence of Respondent's counsel. Moreover, Venard's attempt to retract this portion of his pre-hearing statement while testifying impressed me as contrived.

Even so, Respondent contends that it is not responsible for Cunningham's statement because he was an employee of Aero, rather than Respondent, when the statement was made. Wholly apart from the fact that the circumstances of Cunningham's remarks on November 30 merit the conclusion that he was speaking with the apparent authority of Brown, I have concluded that the accounts of Respondent's principal witnesses, Brown, Rockwood and Cunningham, is so far fetched and untruthful as to merit the inference that Brown had actually selected at least Cunningham to continue in a responsible managerial position prior to November 30. In particular, Cunningham admitted that in the interim period between November 19 and December 1, he prepared a business plan for the continuation of the operation which included, among other matters, the selection of the employees who would be offered employment first. Essentially, Cunningham explained that he did so on the off-hand chance that Brown would decide to operate the business. This assertion was unconvincing when

he made it from the witness chair and it became even more unconvincing when I again studied it in the transcript. For that reason, I refuse to credit Respondent's entire account concerning the timing of the selection of its managerial agents and reject its claim that Cunningham was not its agent when he addressed the employees on November 30.

B. The Poll and Respondent's Refusal to Recognize the Union

Where, as here, a successor employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from its predecessor's work force, the successor is obliged under Section 8(a)(5) of the Act to recognize and bargain with the collective bargaining agent of the predecessor employees. Underlying this obligation is the presumption that the bargaining agent enjoys majority support among the unit employees. If, however, the successor employer can show that the bargaining agent has in fact lost its majority standing, or that it has a good faith doubt based on objective factors that the agent has lost its majority support, it may lawfully refuse to recognize and bargain with the incumbent agent. *Fall River Dyeing & Finishing v. NLRB, supra.*

A successor employer can demonstrate that the employee bargaining agent has actually lost its majority standing either by petitioning for a Board conducted election under Section 9 of the Act or by polling its employees to determine the degree of support the agent enjoys. If the latter course is chosen, the employer must adhere to several safeguards to avoid unlawful interference under Section 8(a)(1) of the Act. When the poll is conducted for the purpose of determining the degree of employee support for an incumbent union, the employer must be able to show that: (1) the union was given advance notice of the time and

place of the poll, *Texas Petrochemicals*, 296 NLRB 1057 (1989); (2) it has a good faith doubt based on objective factors that the union no longer enjoys majority support, *Thomas Industries*, 255 NLRB 646 (1981); (3) employees were told truthfully that the purpose of the poll was for the purpose of determining the degree of support enjoyed by the union; (4) employees were given assurances against reprisals; (5) the poll was conducted by secret ballot; and (6) the poll was conducted in an atmosphere free of unfair labor practices or other forms of coercion, *Strucksnes*, 165 NLRB 1062 (1967).

A successor employer who withholds recognition on the basis of a poll or on the basis of an asserted good faith doubt is essentially acting at its own peril. Hence, if the poll is defective or if the employer is unable to sustain its good faith doubt, an employer may be found guilty of an unfair labor practice.

Respondent admittedly refused to recognize the Union but its answer affirmatively avers that it "conducted a noncoercive poll, by secret ballot and with assurances of nonreprisal,...to determine whether the [unit] employees wanted to be represented by the Union in light of previous statements made by employees against Union representation."

Respondent further avers, and the evidence establishes, that the poll "resulted in seven votes against Union representation and only one vote in favor of Union representation."

The General Counsel argues that although Respondent complied with some of the required safeguards for conducting a valid poll on December 14, the poll nonetheless was defective because it was conducted in the context of an unremedied unfair labor practice, i.e., the

November 30 Cunningham "no union" statement, and a coercive atmosphere as evidenced by the "I doubt that claim" statement made on the ballot form itself.[4] In addition, the General Counsel further notes that Respondent failed to notify the Union in advance of the poll as required by *Texas Petrochemicals*. The Union joins most of the General Counsel's arguments but further asserts that Respondent's good faith doubt evidence is simply "hearsay or supposition" insufficient to support Respondent's refusal to recognize the Union.

For all practical purposes Respondent's brief abandons the poll as a justification for refusing to recognize the Union. Thus, Respondent concedes that it did not notify the Union in advance of the poll but argues that this was merely a technical violation requiring, at most, a cease and desist order. Instead, Respondent now argues that the poll is irrelevant because it "had a sufficient doubt as to the union's majority status even without the poll, and the poll merely provided cumulative evidence of the union's lack of support." The relevant facts and my conclusions on this issue follow.

1. The Evidence

To support its good faith doubt defense Respondent relies on the testimony of Cunningham and Venard about employees expressing disenchantment with the Union. Cunningham testified that sometime in October 1992, shipping and receiving clerk Joe Hernandez stated that he was dissatisfied with the Union as asked how he could get

[4] Although the General Counsel's complaint makes factual allegations concerning the poll in paragraph 12, the complaint contains no specific allegation that the poll constitutes an unfair labor practice. However, as counsel for the General Counsel stated clearly in her opening statement that the poll was unlawful, and as the matter has been fully litigated, I have treated paragraph 12 as an allegation that the poll is an independent unfair labor practice.

rid of the Union. Cunningham told Hernandez that he did not know and did not pursue an answer to Hernandez' question.

Cunningham further testified that a group of employees approached him in early November 1992. The group included Arturo and Reynaldo Ayala, Mike Vigil, Denny Bass and Carlos Cordova who seemed to be speaking for the group. At that time Cordova asked Cunningham how they could "go about decertifying the Union." None of the other employees spoke at all either to express dissatisfaction with the Union or to disavow Cordova's statements to Cunningham. Cunningham promised to find out and, to this end, reported the inquiry (but not the names of those present) to Rockwood. Purportedly, Rockwood provided a long explanation of the decertification process which became so complicated for Cunningham that he abandoned any notion of responding to the employees. Insofar as is known, Cunningham never took the matter up with Cordova or the others again.

Toward the end of November, Cunningham overheard employee Larry Stevens shouting at Union agent LaMothe during a meeting at the shop but he could not understand the substance of the LaMothe-Stevens exchange. Later, Stevens approached Cunningham and stated in an upset manner. "How can I get rid of this Union? They're doing nothing for me. We don't want them here." No evidence establishes that anyone else was present when Stevens made these latter comments. Cunningham provided Stevens with no advice and did not report this incident to his superiors.

Venard testified that he had numerous conversations with employees concerning their dissatisfaction with the Union. He recalled two meetings in particular. On one

occasion in the middle of November, a group of employees which included the two Ayalas, Mike Vigil, Carols Cordova, Bryan Van Overbook, and Danny Bass approached Venard right after a break period. According to Venard, Vigil stated, in substance, that "they were tired of the Union and they wanted to know ...how they could go about getting rid of it." Venard plead ignorance and referred them to Cunningham. Venard told Cunningham that he could expect a visit from these employees and reported the substance of his conversation. About a week later, Venard recalled that he told Rockwood about the conversation.

At approximately the same time, Larry Stevens approached Venard. Although Venard testified that Stevens "wanted to get rid of the Union," Venard said that Stevens was more interested at that time in canceling his dues checkoff so he referred Stevens to the personnel office for that purpose:

After receiving LaMothe's December 11 letter, Brown spoke with Rockwood concerning the Union. Purportedly, Rockwood told Brown that several employees previously had expressed dissatisfaction with the Union to Cunningham and Venard. Brown asked Rockwood to confirm this information with Cunningham and Venard. According to Rockwood, Cunningham and Venard began reporting about employee dissatisfaction with the Union in the summer of 1993. However, in his pre-poll discussions with Brown, Rockwood testified that no mention was made of names and numbers of dissatisfied employees but Brown claims that he was given the impression that more than a majority were opposed to Union representation.

As a result of their exchanges, Brown and Rockwood decided to poll employees on December 14 concerning their desire for Union representation. Mechanically, Rockwood

assembled the employees and explained the purpose of the poll. He further explained the procedure for secret balloting and assured employees that their vote one way or the other was of no moment to him and would not affect their position with the Company. Brown was present during this explanation.

Each employee was given a ballot and permitted to mark it in the privacy of the production office. The ballot began with the explanation that the Union claimed to represent a majority of the unit employees and continued with the following words: " I doubt that claim. However, to clear up this matter, the purpose of this secret poll is to determine the truth of the union's claim." After all unit employees voted, that ballots were counted with the result that has been noted above. Respondent's counsel thereafter sent LaMothe the letter declining to recognize the Union.

2. Further Findings and Conclusions

Based on the foregoing, I conclude that Respondent violated Section 8(a)(1) and (5) of the Act as alleged by its refusal on December 14 to recognize the Union and that Respondent independently violated Section 8(a)(1) and (5) by polling its employees on the same date.

Strucksnes, *Thomas Industries*, and *Texas Petrochemicals* compel the conclusion that Respondent's poll was unlawful. First, I find that the poll was conducted in an atmosphere of coercion and unremedied unfair labor practices. As noted above, I have concluded that Cunningham violated Section 8(a)(1) by informing employees that there would be no union in the new operation. Since that remark occurred in the course of informing employees for the first time about the certainty of a continued operation and immediately in advance of the initial selection of employees for the new entity, the

likelihood that the "no union" statement would signal employees that their continued employment was dependent upon the abandonment of their Union adherence would be extremely high.

Secondly, I find that regardless of Cunningham's November 30 statement, the evidence of employee disaffection described by Cunningham and Venard is badly tainted by the unalleged unfair labor practices of Respondent's predecessor which were occurring at the time the disaffection was apparently spreading. Thus, Rockwood's admission that he unilaterally abrogated significant economic terms of the collective bargaining agreement while serving as Aero's president without securing authorization from the bankruptcy court to do so establishes that Respondent's predecessor created an atmosphere, albeit out of necessity perhaps, which, in my judgment, precludes any reliance on the disaffection evidence provided by Cunningham and Venard. Clearly, Aero's economic distress left the Union with practically no reasonable responses to these unilateral changes. Even so, the testimony of Cunningham and Venard fails to demonstrate that a majority of Aero's employees wanted to get rid of the Union. The evidence of Union disaffection does not become sufficient for the purposes use here until Respondent - and Cunningham in particular - culled through Aero's work force in the selection of its initial complement of employees and the overall atmosphere of Aero's final months is ignored. Accordingly, I conclude that it would be unreasonable to permit Respondent to look back upon this disaffection evidence free of the context in which it arose as a basis for asserting its alleged good faith doubt either for the purpose of conducting the poll as required by Thomas Industries or for the purpose of withdrawing recognition.

Finally, as it concedes in its brief, the poll is tainted by Respondent's failure to give the Union advance notice of the time and place of the poll as required by *Texas Petrochemicals*. In view of these conclusions, I find it unnecessary to address the General Counsel's contention concerning the ballot language.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act which is the exclusive representative of the following appropriate unit of employees under Section 9(a) of the Act:

> All production and maintenance employees including quality control inspectors, maintenance mechanics, metal fabricators, extrusion formers, stretch press operators, warehousemen, assemblers, machinist trainees and machine operators employed at Respondent's facility located at 18620 Broadway, Gardena, California; excluding office clerical employees, confidential employees, supervisors and guards as defined under the Act.

3. By informing employees on November 30 that there would be no union when it commenced its operation, Respondent engaged an in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By polling its employees concerning representation by the Union on December 14 and by thereafter refusing to recognize and bargain with the Union

as requested, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

5. Respondent did not violate the Act as alleged in connection with setting its initial terms and conditions of employment.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, my recommended order will require it to cease and desist from the unlawful actions found here and to take certain affirmative action designed to effectuate the policies of the Act. Affirmatively, the recommended order requires Respondent to forthwith recognize and bargain with the Union as the representative of its employees in the existing appropriate unit, and post an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[5]

ORDER

The Respondent, Advanced Stretchforming International, Inc., Gardena, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

---

[5] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. Any outstanding motions inconsistent with this Order are denied.

a. Telling potential applicants for employment that it intends to operate with no union when it is obliged to recognize and bargain with Amalgamated Local Union No. 509, International Union, United Automobile, Aerospace and Agricultural Implement Workers of 35 America (UAW), AFL-CIO.

b. Refusing to recognize and bargain with Amalgamated Local Union No. 509, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Forthwith notify Amalgamated Local Union No. 509, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, in writing that it recognizes that labor organization as the exclusive representative of its employees under Section 9(a) of the Act and will bargain with it concerning the terms and conditions of employment for employees in the following appropriate unit:

> All production and maintenance employees including quality control inspectors, maintenance mechanics, metal fabricators, extrusion formers, stretch press operators, warehousemen, assemblers, machinist trainees and machine operators employed at Respondent's facility located at 18620 South Broadway, Gardena, California; excluding office clerical employees, confidential employees, supervisors and guards as defined under the Act.

b. Post at its Gardena, California, facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

c. Notify the Regional Director in writing within 20 days from the date of this Order of the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations concerning Respondent's failure to bargain about its initial terms and conditions of employment be dismissed.

Dated, San Francisco, CA November 18, 1994

_____

ADMINISTRATIVE LAW JUDGE

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board, An Agency of the United States Government

Following a hearing before an administrative law judge, the National Labor Relations Board has found that we violated the National Labor Relations Act and ordered us to post and abide by this notice.

WE WILL NOT tell employees that we intend to operate with no union when we are obliged to recognize and bargain with Amalgamated Local Union No. 509, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO.

WE WILL NOT refuse to recognize and bargain with Amalgamated Local Union No. 509, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL forthwith notify Amalgamated Local Union No. 509, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, in writing that we will recognize with that labor organization as the exclusive representative of our employees under Section 9(a) of the Act and will bargain

with it concerning the terms and conditions of employment for employees in the following appropriate unit:

> All production and maintenance employees including quality control inspectors, maintenance mechanics, metal fabricators, extrusion formers, stretch press operators, warehousemen, assemblers, machinist trainees and machine operators employed at 18620 South Broadway, Gardena, California; excluding office clerical employees, confidential employees, supervisors and guards as defined under the Act.

ADVANCED STRETCHFORMING INTERNATIONAL, INC.

(Employer)

Dated _____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the NLRB Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5455, Telephone (213) 894-5229.

APPENDIX G

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

Case 21-CA-29104

ADVANCED STRETCH-FORMING INTERNATIONAL, INC.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AMALGAMATED LOCAL UNION NO. 509 AFL-CIO.

CORRECTIONS

Correct the Decision in this matter [JD(SF)-81-94] as follows:

1. Page 2, line 46, delete "the."

2. Page 3, line 1, delete the comma after "California."

3. Page 5, line 15, change "no" to "not."

4. Page 5, line 46, delete "until about a week later."

5. Page 9, line 27, change "as" to "and."

6. Page 11, line 22, change "use" to "used."

7. Page 12, line 41, reletter the subparagraph from "c." to "d."

8. Page 12, insert the following between subparagraphs "b" and "d:"

   c. Polling its employees concerning representation by Amalgamated Local Union No. 509, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO in an atmosphere of coercion and unfair labor practices.

9. Substitute the attached Appendix for the Appendix served with the Decision.

DATED: December 9, 1994.

ADMINISTRATIVE LAW JUDGE

JD(SF)-81-94

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

Following a hearing before an administrative law judge, the National Labor Relations Board has found that we violated the National Labor Relations Act and ordered us to post and abide by this notice.

WE WILL NOT tell employees that we intend to operate with no union when we are obliged to recognize and bargain with Amalgamated Local Union No. 509, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO.

WE WILL NOT refuse to recognize and bargain with Amalgamated Local Union No. 509, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO.

WE WILL NOT poll employees about representation by Amalgamated Local Union No. 509, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, in an atmosphere of coercion and unfair labor practices.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL forthwith notify Amalgamated Local Union No. 509, International Union, United Automobile, Aerospace

and Agricultural Implement Workers of America (UAW), AFL-CIO, in writing that we will recognize that labor organization as the exclusive representative of our employees under Section 9(a) of the Act and will bargain with it concerning the wages, hours, and other terms and conditions of employment for employees in the following appropriate unit:

> All production and maintenance employees including quality control inspectors, maintenance mechanics, metal fabricators, extrusion formers, stretch press operators, warehousemen, assemblers, machinist trainees and machine operators employed at 18620 South Broadway, Gardena, California; excluding office clerical employees, confidential employees, supervisors and guards as defined under the Act.

ADVANCED STRETCHFORMING
INTERNATIONAL, INC.
(Employer)

DATED _____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning compliance with the provisions of this notice may be directed to the NLRB Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5455, Telephone (213) 894-5229.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-71047
NLRB NO. 21-CA-29104

ORDER

NATIONAL LABOR RELATIONS BOARD

Petitioner,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AMALGAMATED LOCAL UNION No. 509, AFL-CIO,

Petitioner-Intervenor,

v.

ADVANCED STRETCHFORMING INTERNATIONAL, INC.,

Respondent.

Before: BOOCHEVER, O'SCANNLAIN and TASHIMA, Circuit Judges

Judges Boochever and Tashima have voted to deny the petition for rehearing. Judge Tashima has voted to deny the petition for rehearing en banc and Judge Boochever so

recommends. Judge O'Scannlain has voted to grant the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

APPENDIX I

UNITED STATES CODE ANNOTATED
TITLE 29

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit

covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required a as condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

APPENDIX J

No. 97-71047

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD
Petitioner,

v.

ADVANCED STRETCHFORMING INTERNATIONAL, INC.,
Respondent.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 509
Intervenor,

On Application for Enforcement of an Order of the National Labor Relations Board

NLRB NO. 21-CA-29104

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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Attorneys for Respondent
Advanced Stretchforming International, Inc.

INTRODUCTORY STATEMENT OF COUNSEL PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35(B)(1)

Petitioner Advanced Stretchforming International, Inc. ("ASI") hereby submits this Petition for Rehearing and Suggestion for Rehearing en banc with respect to the Panel majority's decision entered in this matter on April 4, 2000. By enforcing the National Labor Relations Board's (the "Board's") unfair labor practice determination on a legal theory that the Board did not rely upon after finding it non-determinative of the issue, the Panel majority's decision conflicts with decisions of this Court, including *Dep't of Agriculture v. FLRA*, 895 F.2d 1239 (9th Cir. 1990), and *NLRB v. HMO Int'l/California Medical Group Health Plan, Inc.*, 678 F.2d 806 (9th Cir. 1982) and with decisions of the United States Supreme Court, including *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943), and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983), on a matter of tremendous importance to all employers governed by the National Labor Relations Act (the "Act"). Accordingly, consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions, and to bring this Court's decisions into conformity with United States Supreme Court precedent.

INTRODUCTION

On September 17, 1997, the Board applied to this Court for the enforcement of its Order, which determined in part that ASI violated the Act by "unilaterally changing wages and benefits" without first bargaining with the union that had previously represented the individuals whom ASI ultimately hired. The Board based this Order on its

conclusion that ASI had "forfeited" its otherwise unquestioned right to set the initial terms and conditions of employment by stating that there would be "no union" at its workplace.

On April 4, 2000, a Panel of this Court (Circuit Judges Boochever and Tashima; Circuit Judge O'Scannlain, dissenting) granted the Board's Petition for Enforcement. The Panel majority did not, however, rely upon the Board's forfeiture doctrine in reaching this conclusion. Rather, the Panel majority substituted its own determination for that of the Board on the issue of whether ASI's imposition of initial terms and conditions of employment was unlawful. The Panel majority determined that ASI's initial terms and conditions violated the Act not because ASI made its "no union" statement, but rather because ASI had made it "perfectly clear" that it planned on hiring all of the employees of its predecessor. Notably, this "perfectly clear" analysis was applied by the Administrative Law Judge (the "ALF), who expressly found that it was not perfectly clear that ASI planned on hiring all of the employees of its predecessor. The ALJ's perfectly clear analysis was reviewed and undisturbed by the Board. The Board found such finding to be "not . . . determinative of the legality of the Respondent's conduct." Instead, the Board used the so-called "forfeiture doctrine" as the basis for finding a Section 8(a)(5) violation. *Advanced Stretchforming Int'l, Inc.*, 323 N.L.R.B. 529, 530 (1997). Implicit in the Board's finding was the fact that, but for its reliance on the "forfeiture doctrine," the ALJ's correct analysis under the "perfectly clear" exception would have been determinative.[1]

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[1] Indeed, if the Board had disagreed with the ALJ and found that it *was* perfectly clear, that analysis *would* have been determinative and there would have been no need for reference to the forfeiture doctrine.

The Panel majority's decision to enforce the Board's order on a legal theory that the Board expressly chose not to rely upon because it found it to be not determinative of the issue impermissibly usurps the Board's exclusive jurisdiction to prevent and redress unfair labor practices under the Act, contravenes established precedent of the Supreme Court and of this Circuit, and raises an issue of law that is of utmost importance to all parties whose conduct is governed by the Act. Moreover, if left in tact, the Panel majority's decision will fundamentally disrupt the firmly-established process by which labor disputes are resolved and have the effect of overruling the Supreme Court's decision in *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972).

ARGUMENT

I. THE PANEL MAJORITY'S DECISION USURPS THE BOARD'S EXCLUSIVE JURISDICTION OVER UNFAIR LABOR PRACTICE CHARGES AND CONFLICTS WITH ESTABLISHED SUPREME COURT AND NINTH CIRCUIT PRECEDENT

A. The Board's Exclusive Jurisdiction And The Scope And Standard Of Appellate Review

It is a well-settled principle of administrative law that courts are not free to enforce the decisions of administrative agencies on grounds other than those relied upon by the agency itself. *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) (*Chenery II*).[2] The

[2] *See also Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (noting that "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

Supreme Court has explained that it is "a simple but fundamental rule of administrative law . . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Id.*

This well-established rule of administrative law applies with particular force in the context of a circuit court's review of a decision of the Board because Congress has provided the Board with unique authority to interpret and enforce the Act. Indeed, the Act vests exclusive jurisdiction to prevent and remedy unfair labor practices in the Board. *Amalgamated Utility Workers v. Consolidated Edison Co. of New York*, 309 U.S. 261, 269, 60 S. Ct. 561, 84 L. Ed. 738 (1940). "The Board is thus made the paramount agency for dealing with unfair labor practices." *Id.* at 267 (*quoting* H.R. Rep. No 972, 74th Cong., 1st sess., p. 21).

Although 29 U.S.C. § 160(e) vests the courts of appeals with jurisdiction to enforce an order of the Board, the scope of such review is narrowly circumscribed. In *Louisiana-Pacific Corporation v. NLRB*, 52 F.3d 255 (9th Cir. 1995), the Ninth Circuit clarified the scope of review applicable to Board decisions:

> A reviewing court "must judge the propriety of [agency] action solely by the grounds invoked by the agency," and "that basis must be set forth with such clarity as to be understandable." *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97, 67 S. Ct. 1575, 1577, 91 L.

> Ed. 1995 (1947). In other words, when we review an agency's order for substantial evidence, it is not enough that substantial evidence supports a basis that is invoked for the first time on appeal; there must be substantial evidence to support the basis that was invoked by the agency below. "[A]n agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.2d 141 (1974) (*quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962)).

Id. at 259.[3] Thus, although the courts of appeals "are authorized to set aside, enforce, or modify the NLRB's decision . . . . [they] must confine any such action to an issue that has actually been determined by the NLRB." *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1212 (7th Cir. 1996). "For purposes of affirming no less than reversing its orders, an appellate court can not intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *NLRB v. HMO*

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[3] In *Louisiana-Pacific*, the Court also noted that:

> Under settled principles of administrative law, the Board, not a reviewing court, is charged with deciding which theory of Section 8(a)(5) liability should be pursued. It is not our function to "spell out, to argue, to choose between conflicting inferences," *Sec'y of Agriculture v. United States*, 347 U.S. 645, 74 S. Ct. 826, 832, 98 L. Ed. 1015 (1954), nor to supply a theory that the Board was unable to articulate.

Id. at 261.

International/California Medical Group Health Plan, Inc., 678 F.2d 806, 811 (9th Cir. 1982).

In addition to this narrow scope of review, the courts of appeals are constrained by a standard of great deference to the Board's findings. The court of appeals must treat "as conclusive the factual determinations in a Board decision if they are 'supported by substantial evidence on the record considered as a whole.'" *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977) (*quoting* Section 10(e)-(f) of the Act).[4] Moreover, a reviewing court may not "displace the NLRB's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *SKS Die Casting & Machining, Inc. v. NLRB*, 941 F.2d 984, 988 (9th Cir. 1991) (*quoting Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 463-65, 95 L. Ed. 456 (1951)). The court must uphold the Board's decision only "'if its factual findings are supported by substantial evidence and if it has correctly applied the law.'" *Id.* (*quoting NLRB v. Champ Corp.*, 913 F.2d 639 (9th Cir. 1990)).

B. The Panel Majority's Decision Usurps The Board's Jurisdiction By Exceeding The Scope And Standard Of Review And Contravenes Established Supreme Court And Ninth Circuit Precedent

Here, the Panel majority's decision unquestionably contradicts established Ninth Circuit and Supreme Court precedent, exceeds the court's limited scope and standard of

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[4] Although this statutorily mandated deference to findings of fact runs in favor of the Board and not in favor of the initial trier-of-facts, the ALJ's findings of fact constitute a part of that whole record which the court must review. The court must "give those initial findings some weight, whether they support or contradict the Board's factual conclusions." *Id.* (*citing Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492-97, 71 S. Ct. 456, 95 L. Ed. 456 (1951)).

review, and divests the Board of its exclusive jurisdiction to decide unfair labor practice cases. Even a cursory review of the facts illustrates the Panel majority's disregard of its limited role in reviewing Board decisions. In this case, the ALJ, relying on *Burns*, as interpreted by the Board in *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), determined that ASI did *not* violate Section 8(a)(5) of the Act by unilaterally setting different terms and conditions of employment following its purchase of the defunct Aero Stretch, Inc., because ASI clearly manifested its intention to establish its own initial terms and conditions of employment.[5] For this reason, the ALJ found that the "perfectly clear" exception in *Burns* was not satisfied, and that ASI retained its common law right to establish those initial terms and conditions.

The Union filed exceptions to the ALJ's findings and the parties briefed the issue of whether the "perfectly clear" exception in *Burns* applied to the facts of this case. Upon careful consideration of the issue, the Board did not disturb the ALJ's findings, but found that those findings were not determinative for Section 8(a)(5) liability because of the application of a different legal theory of liability – the so-called "forfeiture doctrine." The Board reached this conclusion by expanding its administratively created forfeiture doctrine into judicially untested waters, holding that an employer who violates Section 8(a)(1) by stating that

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[5] In *Burns*, the Supreme Court stated that although a successor employer is ordinarily free to set initial terms and conditions of employment, when it is "perfectly clear" that a successor employer plans to retain all of the employees in the unit and that the incumbent union represents a majority of the employees, it will be appropriate for the successor employer to consult with the employees' bargaining representative before he fixes terms. *Burns*, 406 U.S. at 295. The *Burns* caveat was limited by the Board in *Spruce Up, supra.*, 209 N.L.R.B. 194, to cases "in which the new employer either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."

there will be "no union" somehow forfeits its common law contractual right under *Burns* to establish initial terms and conditions of employment.[6]

Rather than passing on the Board's ever-expansive forfeiture doctrine, which has the effect of eviscerating *Burns,* the Panel majority in this case ignored it, and instead applied the "perfectly clear" exception – reaching a result directly contrary to that of the Board and the ALJ (*i.e.,* that it *is* determinative and that it *was* perfectly clear that ASI planned on retaining all of its predecessor's employees). The Court accomplished this by entering the Board's domain and administering the Act, ultimately reaching its own unique conclusion that, because it was "perfectly clear that ASI intended from the outset to constitute the majority of its workforce from the ranks of its predecessor, and its duty to bargain therefore commenced immediately . . . . it was an unfair labor practice for ASI to impose terms without first consulting with the union." *NLRB v. Advanced Stretchforming Int'l, Inc.*, 2000 WL 343006, 4 (9th Cir. 2000). By ignoring both the scope of the Order that the Panel majority was charged with reviewing and the undisturbed findings of the Board and the ALJ, the Panel majority unquestionably exceeded its limited scope of review under 29 U.S.C. § 160(e) and stripped the Board of its exclusive jurisdiction to determine unfair labor practices under the Act. Thus, under *Chenery I* and *Louisiana-Pacific,*

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[6] Prior to this decision, the Board limited its application of this novel doctrine to the context of defining an appropriate remedy for an employer that sought to avoid the successor's bargaining obligation by refusing to hire applicants from the predecessor's unionized work force. In this case, however, there is no question that ASI did not refuse to hire applicant's from Aero. In fact, ASI hired its employees exclusively from Aero. Thus the Board's decision is an attempt to erode *Burns* by eliminating a successor employer's right to set initial employment terms and conditions whenever the employer engages in any conduct later determined to be an unfair labor practice.

the Panel majority's reliance upon its own argument to enforce the Board's decision is plainly impermissible.[7]

II. THE COURT HAS BROADENED THE "INTERPRETATION OF A FEDERAL STATUTE" EXCEPTION TO SUCH A DEGREE THAT IT HAS WHOLLY USURPED THE BOARD'S AUTHORIZATION

As set forth above, the Board is vested with unique authority to interpret and enforce the Act. Nevertheless, the Panel majority toppled this long-standing legal principle by broadly characterizing the issue in this case as "whether Sections 8(a)(5) and (1) of the National Labor Relations Act require a successor employer to bargain collectively before imposing terms when it hires its initial complement of workers entirely from the ranks of a represented unit." *NLRB v. Advanced Stretchforming Int'l, Inc.*, 2000 WL 343006, 1 (9th Cir. 2000). By improperly framing the issue in this way, the Panel majority enabled itself to rely upon a narrow exception to the normal rule that a reviewing court is prohibited from affirming an agency decision on a ground different from the one used by the agency. Specifically, the Panel majority relied on the Ninth Circuit's "interpretation of a federal statute" exception to the normal rule that an agency's decision must be affirmed or denied based on the ground relied upon by the agency. *See Railway Labor Executives' Ass'n v. Interstate Commerce Comm'n*, 784 F.2d 959 (9th Cir. 1986). But the Panel majority's erroneous and result-driven reliance on this narrow exception not only conflicts with decades of Ninth Circuit and Supreme Court

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[7] *See also SEC v. Chenery*, 318 U.S. 80 (1943) (*Chenery I*); *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 631 n. 31 (1980) (holding that "the validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination").

legal precedent, it also usurps the Board's unique authority to interpret and enforce the Act.

A. The "Interpretation Of A Federal Statute" Exception Is Inapplicable In This Case

In *Railway Labor Executives' Ass'n, supra,* 784 F.2d 959, this Court concluded that *Chenery I* is inapplicable "when, as here, the issue in dispute is the interpretation of a federal statute." *NLRB v. Advanced Stretchforming Int'l, Inc.*, 2000 WL 343006, 5 (9th Cir. 2000). However, as recognized by Justice O'Scannlain in his dissent, the novel basis the Court considered in *Railway Labor Executives' Ass'n* "in no way involved the application of substantive terms of a statute for reasons not adopted by the agency in the order under review." *Id.* at 9, n. 1. Rather, "the reasoning at issue related to the scope of the agency's power under a federal statute." *Id.* [8] Here, by contrast, the Panel majority made a factual finding that ASI made it "perfectly clear" that it planned on retaining all of the employees in the unit. *Id.* at 5. And it is that factual finding that reveals the true issue the Panel majority addressed (*i.e.*, Did ASI make it perfectly clear that it planned on retaining all of the employees in the unit?). *See Burns*, 406 U.S. at 294. This issue is not one of statutory interpretation within the meaning set forth in *Railway Labor Executives' Ass'n*. Indeed, as Justice O'Scannlain correctly recognized, here, the Panel majority was not interpreting the Act – it was administering

[8] In *Railway Labor Executives' Ass'n*, an order of the Interstate Commerce Commission ("ICC") was challenged because the ICC had refused to impose certain labor protections as a condition of its approval of the sale of a railroad line. A third party intervenor asserted that Congress had foreclosed the ICC's discretion to impose such labor protections. The Court considered the third party's proposed justifications for the ICC's order because the issue involved only the "interpretation of a federal statute" (*i.e.*, the *scope* of the ICC's statutory discretion). Thus, in contrast to the "interpretation" of a federal statute advanced by the Panel majority in this case, *Railway Labor Executives' Ass'n* did not involve the substantive application of a statute to factual findings.

it – "with the unilateral declaration that ASI committed an 'unfair labor practice' when it set the initial terms of employment." *Id.* at 9. Thus, because the Panel majority was applying the Act's substantive terms, as opposed to merely interpreting them, the Panel majority's reliance on the "statutory interpretation" exception is misplaced.

B. If The "Statutory Interpretation" Exception Applies In This Case, Then It Will Apply In Every Case And The Board's Authority Will Have Been Usurped

By incorrectly concluding that the rule of *Chenery* is inapplicable whenever the issue in dispute involves the interpretation of a federal statute, such as the Act, the Panel majority has usurped the Board's unique authority. A circuit court's review of a Board decision will almost always involve some reference to the Act. *See, e.g., NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-87, 110 S. Ct. 1542, 108 L. Ed. 2d 801 (1990); *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1987). Thus, by concluding that the "perfectly clear" analysis involves the type of statutory interpretation contemplated in *Railway Labor Executives' Ass'n*, the Panel majority enabled itself to affirm or deny all future Board decisions based on its own novel theories simply because, regardless of the precise issue raised by the parties, the ultimate issue will *always* be whether the Act has been violated. However, if that is enough to apply the "interpretation of a federal statute" exception to the basic rule, then the exception has now swallowed the rule and the Board no longer is the "paramount agency for dealing with unfair labor practices." *Amalgamated Utility Workers, supra*, 309 U.S. at 269 (1940). This result eviscerates the

Board's unique authority and conflicts with well-established Ninth Circuit and Supreme Court precedent.[9]

III. THE COURT SHOULD FINALLY RESOLVE THIS CASE BASED ON ITS ACCEPTANCE OR DENIAL OF THE FORFEITURE THEORY ADVANCED BY THE BOARD

In its Petition for Rehearing, the Board argues for rehearing on the forfeiture theory of successorship unfair labor practice liability, but then creates a safety net for itself by arguing that, if the Court does not uphold the Board's liability finding on that ground, "it should remand the case to the Board for consideration of the 'perfectly clear' successorship issue in the first instance." (Bd. Petition 14.) However, the Board has *already* considered that issue in the first instance and found it non-determinative of the legality of ASI's conduct. *Advanced Stretchforming Int'l, Inc.*, 323 N.L.R.B. 529, 530 (1997). Thus, while ASI agrees with the Board that the Court should rehear this matter and that the matter should be reheard *en banc*, ASI disagrees that the

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[9] Setting the preceding issues of administrative law aside, the Panel majority's faulty application of the "perfectly clear" exception has the effect of overruling *Burns*. In *Burns*, the Supreme Court noted that a successor employer has the unfettered common law contractual right to fix the initial terms and conditions of employment. A narrow exception to this rule exists where it is "perfectly clear" that a successor employer plans to retain all of the employees in the unit. In such cases, it will be appropriate for the new employer initially to consult with the union before it fixes terms. Here, the Panel majority impermissibly looked at the ultimate outcome (*i.e.*, employees accepted the changed terms and conditions) to determine ASI's original "plan" with respect to retaining employees. This approach is illogical and contrary to *Burns*. Clearly, it is ASI's original intent that is crucial, not the fact that employees ultimately accepted the new and different terms. Indeed, the Panel majority's "after-the-fact" analysis breaks down because there is at least an equal chance that some or all of the employees would have rejected the new terms, in which case the Panel majority presumably would have reached the opposite result. This faulty application of *Burns* harms employers because they can never know what their rights are at the time they are acting, and are bound by events that they cannot possibly predict.

"perfectly clear" issue should be remanded to the Board if it does not prevail on its novel and expansive forfeiture theory. Indeed, if the Board were permitted to revisit this issue on remand, then the Court would establish the type of "ping-pong" scenario that it sought to avoid. *NLRB v. Advanced Stretchforming Int'l, Inc.*, 2000 WL 343006, 6 (9th Cir. 2000). ("*Chenery* does not require that we convert judicial review of agency action into a ping-pong game."). By seeking enforcement of its Order solely on its most expansive and aggressive legal theory, *i.e.*, the so-called "forfeiture doctrine," the Board is able to use the enforcement process as a trial run for its novel and expansive legal theories, with the plan that if the legal theory does not pass Ninth Circuit muster, the Board nevertheless will be able to obtain its desired result on remand by returning to a more established legal theory. This "test the waters" approach to enforcing its orders is inappropriate in any case. In this case, however, it is especially inappropriate because the Board already addressed the "perfectly clear" issue, found it to be non-determinative, and based its Order solely on the forfeiture doctrine. Thus, the Board's Order must be affirmed or denied on the forfeiture doctrine, and remand of the "perfectly clear" issue is inappropriate given that the Board has already addressed that issue.

CONCLUSION

For the reasons set forth herein, ASI respectfully requests that the Court grant rehearing, and suggests rehearing *en banc*, of the Board's application of the forfeiture doctrine to the facts of this case. If the Court determines that the forfeiture doctrine is not legally viable or resolves its application in ASI's favor, then the Court should deny enforcement of the Board's Order without remanding the matter to the Board for further, duplicative, proceedings.

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Respectfully submitted,

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